No. 2725.

United States

Circuit Court of Appeals

For the Ninth Circuit

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

Brief of Appellants Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson.

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STATEMENT OF THE CASE.

This appeal is from an interlocutory decree of a most extraordinary character. While it is in form an injunction, it is in fact a decree for specific performance and requires the performance of an impossible act—the furnishing of water in excess of the

available supply—under the penalty that, until this has been done, nothing can be collected or recovered for the water that has heretofore been made available for and used by the farmers through a completed irrigation system constructed at an expense of upwards of $3,500,000.

The theory upon which the decree is based finds no precedent in reported cases, and no authority is cited by the learned District Judge in his decision covering twenty-eight pages of the printed record (Rec. pp. 279-307).

This brief is intended only as supplementary to the brief that will be filed by the appellant, Twin Falls Salmon River Land and Water Company, hereinafter called simply the Land and Water Company, and we shall confine our statement and argument to such facts and questions of law as pertain directly to the rights of the appellants in whose behalf this brief is filed.

The Commonwealth Trust Company of Pittsburgh is Trustee for the holders of $1,773,000 par value bonds issued by the Land and Water Company, and secured by a mortgage upon the irrigation system, and by the pledge of settlers' contracts to the aggregate amount of $2,337,319.92 (Rec. p. 118), which contracts were given by the settlers in payment for shares or interests in the irrigation system and the water rights connected therewith and are a first lien upon the lands therein described and the appurtenant water rights acquired in the system. The bonds so issued are held by a large number of people in no way

connected with the promotion of the enterprise or with the Land and Water Company as stockholders or officers of said company.

The appellant, A. C. Robinson, holds similar settlers' contracts to the aggregate amount of $194,-397.48 (Rec. p. 124).

Both of these appellants have, therefore, a most substantial interest in the decree appealed from, which enjoins the collection of any payment and the enforcement of any rights under the contracts. The appellant, Commonwealth Trust Company of Pittsburgh, hereinafter called the Trustee, was enjoined from proceeding with the further prosecution of two suits in equity which it had instituted for the foreclosure of water contracts pledged with it as aforesaid and upon which default had been made. (Rec. p. 190.)

The following facts, we believe, are undisputed:

(a) The Land and Water Company, on April 30, 1908, entered into a contract with the State of Idaho under the Act of Congress commonly known as the "Carey Act" and the laws of the State of Idaho, accepting the terms of such Act and providing a course of procedure thereunder (Plaintiffs' Exhibit "A," Rec. pp. 42-62). The lands to be reclaimed by the irrigation system to be constructed under the terms of said contract, hereinafter called the State Contract, consisted of (1) lands segregated from the public domain under said Act of Congress, (2) lands owned by the State of Idaho, (3) lands held in private ownership or under forms of entry made under

the public land laws under other than the Carey Act, making in the aggregate approximately 150,000 acres, and for the irrigation of such lands the State set aside, in the form of a water permit, and dedicated to the said project 1,500 cubic feet per second of the public waters of the State of Idaho, flowing in what is known as the Salmon River. (Para. IV of Plaintiffs' Exhibit "A," Rec. pp. 47-48.)

(b) That the State Board of Land Commissioners of the State of Idaho was moved to apply under the Carey Act for the segregation of the public lands and to contract with the Land and Water Company for the construction of the irrigation works and to open such lands for entry, by the official report of the State Engineer (Exhibit "F," Rec. pp. 388-391), in which report the State Engineer estimates that approximately 150,000 acres of land may be reclaimed by the proposed irrigation system and that 1500 cubic feet of water per second was available for such purpose.

(c) That on June 1, 1908, pursuant to the State Contract and the statutes of the State of Idaho, 90,000 acres of the public lands so segregated under the Carey Act were thrown open for entry (Rec. p. 223); that before the same could be lawfully entered or filed upon the entryman was under the law required to produce evidence that he had acquired a share or interest in such irrigation system, water rights and franchises sufficient to reclaim the land that he proposed to enter. The share or interest in the system, which the State demanded that the entryman should

first have acquired, is defined in the State Contract, particularly in para. VI (Rec. p. 48), which reads as follows:

"VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares or water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the stock of the Salmon River Canal Company, Limited, as hereinafter provided, and the said second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but *shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be*

irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners." (Our italics.)

The shares or interests which the State required the entrymen to purchase and the Land and Water Company to sell are further defined in para. VIII of the State Contract (Rec. p. 50) as follows:

"Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one cubic foot of water per acre per second of time, and each share of water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein, based upon the number of shares finally sold in said canal."

There are other parts of the State Contract referring to the matter but always in substantially the language set out above.

(d) That on June 1, 1908, the Land and Water Company entered into contracts in accordance with the terms of the State Contract for approximately 70,000 acres, and immediately thereafter additional contracts were entered into until the total acreage included in such contracts reached 73,348 acres (Rec. p. 218); that the Land and Water Company has since refused, and still refuses, to enter into further con-

tracts for the sale of shares, interests, or water rights in such irrigation system.

That the State Contract provides that the price for such water rights, shares or interest shall not exceed $40 per share, one-fifth of which the Company may demand in cash at the time of sale, and the remainder in five equal annual installments, bearing interest at 6%, but the State Contract also provides that it shall not be construed to prevent the sale of shares or water rights on terms more favorable than those therein provided, or to prevent payment in advance of maturity. (Rec. pp. 51-52.) The Land and Water Company sold such shares or interest on the basis of $3 per acre or share in cash, and the balance in eleven annual deferred payments. (Rec. pp. 67, 149.)

(e) That the system has been completed in accordance with the provisions of the State Contract, except possibly in some minor details of no importance so far as this controversy is concerned and except also that some of the structures were made more durable and larger than the specifications called for. The testimony of the chief engineer of the company, Mr. E. B. Darlington, upon this point is uncontradicted. He says (Rec. pp. 219-220):

> "The canals were designed and constructed with an excess capacity of about 20% over the specifications. That is the exact specification for carrying 1-100 of a second foot or one second foot per 100 acres. They were built with a capacity of about a second foot for 80 acres. The system

was originally built for 100,000 acres, the main canal for 125,000 acres, with 1250 sec. ft. capacity."

That, after the State Contract had been entered into, or about that time, some question arose as to the number of acres that could be irrigated from the average water supply, and the State either consented to or requested that for the present the sale of water rights, shares or interests in the system be limited to 100,000 acres, but the Land and Water Company discontinued or refused to make further sales after it had reached an acreage of a little over 73,000 acres.

(f) That a large part of the money required for the construction of the works and for carrying out the State Contract was obtained through the sale of bonds to the investing public who had no other connection or association with the project. The State Contract permitted the giving of a mortgage for such purpose, "the form of such mortgage to be approved by the Attorney General of Idaho (Rec. p. 60). The mortgage was introduced in evidence but is not a part of the printed record on appeal. It provides in substance that the settlers' contracts shall be assigned to and deposited with the Trustee as security for the payment of such bonds, and that bonds may be issued to the amount of 80% of the aggregate of the principal of the deferred payments payable under such contracts.

(g) That the water supply is less than the amount reported by the State Engineer in his report

to the State Board of Land Commissioners, dated August 12, 1907, and upon which the State acted when it undertook the enterprise and made its proposal to the Federal Government for the segregation of the public lands under the project. (Rec. pp. 388-391).

(h) This suit was commenced by appellees, eight in number, each the owner of about 160 acres under the project and of an equal number of shares or interests in the system, covered by contracts deposited with the Trustee.

The relief demanded by plaintiffs is in substance:

(1) That the amount due from the settlers under their respective contracts with the Land and Water Company shall be decreed to constitute a trust fund, to be used for furnishing each and every acre of land on the project "with an ample and sufficient supply of water, as contemplated by said State Contract and said settlers' contract, and not less than one-half miner's inch per acre, continuous flow, or 2¾ acre feet per acre if delivered by periods."

(2) That the lien created by the mortgage of the Land and Water Company to the Trustee be cancelled and declared to be void and of no effect and decreed subject and subordinate to the rights of plaintiffs, and that these appellants be restrained and enjoined from collecting any sum whatsoever from the settlers.

(3) That a Receiver be appointed of the Land and Water Company, with power and authority

to collect the sums due or to become due under the settlers' contract, and to cancel and annul a sufficient amount of such contracts and of the stock in the Salmon River Canal Company to reduce the acreage entitled to water from the system to a point within the water supply "so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these claimants, as stated in this complaint," and that the Receiver pay out of the moneys so collected under the settlers' contracts the amount required to effect a reduction in acreage and the cancellation of contracts and stock in the Salmon River Canal Company, covering lands that may be left without water, and all damages that may be sustained by the owners of such lands. (Rec. pp. 37-41.)

The defendants and appellants put in issue the construction of the contracts as to the amount of water or interest in the irrigation system acquired per acre under the State and settlers' contracts; and the defendants contending that each settler was entitled to his proportionate part of all the water available, based upon the number of shares owned by the purchaser and the aggregate number of shares outstanding. While plaintiffs contended that they were entitled to a specified amount of water per acre, and, further, that they could not successfully reclaim their lands and produce crops with less than 2¾ acre feet per acre during each irrigation season, and on

the other hand the defendants and appellants contended that 1½ acre feet per acre was ample for the successful irrigation of the lands under this project, when delivered in periods and at the times required by the crops and the conditions of the weather.

The Court declined to admit any evidence as to the duty of water and held in effect that it was immaterial that the plaintiffs did not need and could not beneficially use the amount of water which they demanded and which the Court held they were entitled to receive under their contracts, as construed in this case. The refusal of the Court to hear evidence as to the duty of water, or the amount of water required under this project, is assigned as error and the evidence so excluded is embodied in Volume 2 of the Record. The proceedings relative to the exclusion of such evidence are set out in the first volume of the Record, pp. 225 to 278.

It is substantially conceded that no additional water can be procured from any other source for use on this project. As to that feature, the District Court said in its opinion:

> "Moreover, when it is remembered that there are no other accessible water resources, and that there is a provision in the contract putting all water right agreements upon an equal footing, regardless of the date of their execution, it will be seen that the question of appropriate and feasible remedy is a most perplexing one should it be held that the plaintiffs are entitled to relief." (Rec. pp. 281-282.)

The Court decided that:

> "An order or an interlocutory decree will be entered restraining the Company from making any contracts or waiving any right of forfeiture of existing ones, and also restraining it, together with the other defendants, from collecting or attempting to enforce payments upon the contracts until the settlers have been provided with the water supply contracted for, or are given trustworthy assurance that it will be provided."

Following this decision and before any order had been entered in the case, counsel for defendants, appellants here, moved the Court for leave to introduce further proof in order to explain the terms and conditions of the contract between the State of Idaho and the Land and Water Company (Rec. pp. 370-391), but the Court declined to hear further evidence on that point or to reopen the case for that purpose (Rec. pp. 391-393), although the Court had in its original opinion left the case open to either party "to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the Vineyard Company suit hereinafter referred to and now pending in this Court, (2) seepage in the reservoir basin and the canal system, and (3) the aggregate amount of water contracts actually outstanding at the time of the application, and, upon the submission of such proof, for the entry of a final

decree." As stated above, notwithstanding the Court left the case open for the purposes stated, it declined to hear any evidence that might tend to explain or make clear what the Court had said were ambiguous provisions of the State Contract.

On November 29, 1915, an interlocutory decree was entered to the effect that the Land and Water Company had contracted to furnish and supply water at the rate of 2¾ acre feet per acre, measured at the point of delivery from the system into the consumers' laterals, for each acre embraced in the aggregate of its water contracts; that such Land and Water Company and the other defendants, including the Trustee and A. C. Robinson, "be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the Court, that said water will be provided, or until the further order of this Court." (Rec. p. 394.)

Under the decree so entered, the Trustee is not permitted to prosecute the suits which it had pending in that Court for the foreclosure of water contracts, and none of the defendants can collect one dollar from the settlers who are grossly in default, and who ever since and including the year 1911 have used and are now using said irrigation system and the water made

available thereby for the irrigation of their lands and for the raising of crops. The order is confiscatory as to these appellants. It destroys the value of their securities. It does not permit them to collect even the reasonable value of what has been furnished or supplied the settlers. It deprives them of recourse to the courts for the enforcement of their rights and for the determination of the damages, if any, that may have been sustained by the settlers and that could be offset against the water contracts. Appellants are deprived of the right to collect from settlers who are satisfied with the amount of water they are receiving and who would have no defense whatever to a suit for the foreclosure of their contracts. From this order the defendants promptly perfected an appeal.

SPECIFICATION OF ERRORS.

The errors relied upon are set forth in considerable detail in the record (pp. 395-401). Stated generally, they are:

1. That the Court erred in holding, decreeing and deciding that the Land and Water Company had in its contract with the State of Idaho or in its contract with the settlers, agreed to furnish water to the amount of 2¾ acre feet per acre, and that the Court erred in so construing such contracts.

2. That the Court erred in holding, decreeing and deciding that the Land and Water Company had agreed, either in its contract with the State of Idaho or in its contract with the settlers, that it would not

sell water rights, shares, or interests in said irrigation system in excess of its ability to deliver 2¾ acre feet of water per acre.

3. That the Court erred in holding, decreeing and deciding that the Land and Water Company and the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and each of them, be enjoined and restrained from collecting or attempting to collect, or from enforcing payment under any contract for the sale of water rights, shares or interest in said irrigation system, until such time as the defendants had provided a water supply sufficient to deliver to such settlers 2¾ acre feet per acre, measured at the point of delivery from the system into the consumers' laterals, or given trustworthy assurance, to be approved by the Court, that such water would be provided.

4. That the Court erred in holding, deciding and decreeing that the plaintiffs and other settlers under said irrigation system were entitled to receive more than their pro rata or proportionate share of all water available for distribution from such irrigation system, and that the Land and Water Company had in any way agreed or warranted that such settler should receive perpetually during each irrigation season 2¾ acre feet of water per acre, or any specified amount, other than his proportionate share of all water available for distribution from said system.

5. That the Court erred in holding and deciding that the duty of water, or the amount of water required per acre under said irrigation system, was

immaterial and that plaintiffs and other settlers under said system were entitled to have provided for them the amount of water called for by their respective contracts regardless of their necessities or needs.

6. That the Court erred in holding and deciding that the form of contract used in the sale of shares or interests in such irrigation system by the Land and Water Company, being plaintiffs' Exhibit "C" attached to the bill (Rec. pp. 62-72) had been prepared by the Land and Water Company and that such contract should be construed more strongly against the defendants than against the settlers.

7. That the Court erred in holding and deciding that the Land and Water Company had issued or caused to be issued or circulated a printed circular, introduced in evidence as plaintiffs' Exhibit 17 (Rec. pp. 147-156), which circular described generally the terms upon which lands could be acquired under said project, the water supply, the soil and climate, markets and natural advantages of the project, there being no evidence that any settler had seen such circular before entering into his contract with the Company, or that any settler had relied in any way upon anything stated in said circular, and there being no evidence as to when such circular was prepared or the relation of the company thereto.

8. The Court erred in declining to consider or admit in evidence the testimony of C. H. Posten, John C. Boren, Joseph Boren, W. M. Worthington, W. T. Holt, J. P. Holmbran, C. J. Griffith, J. S. Welch, J. C. Wheelon, W. G. Sloane, William Wayman, E. B. Dar-

lington, C. C. Thom, A. P. Senior and John Krall, witnesses called by defendants, which testimony was offered for the purpose of showing that the amount of water claimed by the plaintiffs in the bill is unnecessary and is not needed or required for the necessary or proper irrigation of the lands in question; also that the use of the amount of water claimed by the plaintiffs in the bill would be excessive and would be injurious to and impair the value of the lands in question and also that the existing water supply is sufficient for the irrigation of all of the valid existing land entries upon the tract and that the plaintiffs have not and will not be harmed by any alleged insufficiency of the water supply.

9. The Court erred in striking out the evidence of the witness, H. M. Sims, relative to the making of final proof on his land entered under the Carey Act, and as to the statements relative to the water supply made by him in connection with such final proof, and in declining to admit any evidence relative to such final proof.

10. That the Court erred in holding and deciding that the defendants had to deliver to the settlers the amount of water called for by the respective contracts, even though such settler used the water wastefully or to an amount in excess of his reasonable needs.

11. That the Court erred in holding and deciding, without any evidence in support thereof, that at the time the contracts in question were executed "water rights were customarily appropriated, decreed, con-

tracted for, and sold, as definite quantities, and, with rare, if any exceptions, the amount deemed to be necessary, both popularly and by the Courts, exceed the amount here provided for," and that the terms of the contracts here involved were fixed by the Land and Water Company, and not by the settler or any other party to such agreement.

12. That the Court erred in holding and deciding that the Company had entered into contracts to deliver an amount of water in excess of the capacity of the system, and that neither principal nor interest under such contracts could be collected, until the amount of the contracts in excess of such capacity had been cancelled, but failed or declined to determine the amount of such excess or the acreage that could be supplied with the water now available.

13. That the Court failed to enter an enforceable decree or a final decree, finally determining and settling the rights of the parties.

14. That the Court erred in overruling the motion to dismiss, because the bill did not state facts sufficient to entitle complainants to any relief in equity and because of the absence of indispensable parties.

15. That the Court erred in entering any decree in favor of the plaintiffs.

16. That the decision of the Court is contrary to and in conflict with the laws of the State of Idaho as construed by its highest Court, particularly sections 1615 to 1629, inclusive, of the Revised Codes of Idaho.

17. That the decision of the Court and the decree entered herein are contrary to and in conflict with the decision of the Supreme Court of the State of Idaho construing such contracts and the laws of the State of Idaho under which such contracts were entered into and said irrigation system constructed and water rights acquired, and that said decision and decree are particularly in conflict with the following decisions of said Court, to-wit:

State ex rel. West v. Twin Falls Canal Co., 21 Idaho 410, 121 Pac. 1039.
State v. Twin Falls Canal Co., 151 Pac. 1013.
Idaho Irrigation Co. v. Lincoln County et al., 152 Pac. 1058.

That the Court erred in denying the application of appellants to introduce additional proof to explain the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company, dated April 30, 1908 (Rec. pp. 307-391).

POINTS AND AUTHORITIES.

A suit in equity for the cancellation and annulment of a number of water contracts under a Carey Act irrigation project and for enlarging the proportionate interests which the remaining contract holders shall have in the canal system and water rights thereof, cannot be maintained under equity rule No. 38 by some of the contract holders as representatives of all holders of contracts and water rights in the system, including those whose contracts they seek to have cancelled or annulled, on the ground of an al-

leged shortage of water and the necessity of reducing the acreage to be irrigated from the system.

Raich v. Truax, 219 Fed. 272.

In re Englehard, etc., Co., 231 U. S. 646, 58 L. ed. 416.

In such cases there is a conflict of interest and not a community of interest, and such suits cannot be maintained on the theory of avoiding a multiplicity of actions.

Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380.

In such actions, all water users affected by the decree and all parties having an interest in the irrigation system or water rights are indispensable parties, for a decree cannot be entered without affecting their rights and interests in the system.

The State is a necessary party to a suit by certain water users under an irrigation project constructed under the Act of Congress, commonly known as the "Carey Act," and the laws of the State of Idaho passed in furtherance of such Act and providing for the construction of such system, for the cancellation or annulment of the interests and rights acquired in such system by persons who have filed upon lands under the project, pursuant to the laws of the State, and for enjoining the further sale of water rights to such project and for reducing the acreage that may be reclaimed therefrom and for confining the water right dedicated to such project to a lesser area than that specified in the State Contract for the construction of such project; it appearing that the State is

the owner of lands under the project and that a large part of the Carey Act lands segregated for reclamation from the project remain unentered and that final proof has not been made on the other Carey Act lands.

Sec. 4, Act of Congress, August 18, 1894, 28 Stat. 372-422.

Act of Congress approved June 11, 1896, 29 Stat. 413-434.

Sec. 1613 to 1631, Revised Codes of Idaho.

A corporation contracting with the State of Idaho for the construction of irrigation works under what is known as the Carey Act, is not a seller of water rights and is not the owner of the water dedicated for the reclamation of such project, but is merely a construction company.

Acts of Congress and State laws cited, *supra.*

State ex rel. West v. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039.

State v. Twin Falls Canal Co., (Ida.), 151 Pac. 1013.

Idaho Irrigation Co. v. Pew, 26 Ida. 272, 141 Pac. 1099.

Idaho Irrigation Co. v. Lincoln County (Ida.), 152 Pac. 1058.

In the State of Idaho all waters when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, are the property of the State, and the appropriation and distribution of such waters and the right or interest that may be acquired therein by in-

dividuals, is subject to the regulation and control of the State.

Art. 15, Secs. 4 and 5, State Constitution.
Sec. 3240, Idaho Revised Codes.
Bennett v. Twin Falls North Side L. & W. Co., (Ida.), 150 Pac. 336, and cases cited *supra.*

Under the Act of Congress known as the Carey Act and the laws of the State of Idaho relative to the Carey Act projects, the water appropriation for the project is dedicated to all the lands susceptible of irrigation from the system, and the water user is entitled to his proportionate interest in the water rights, canals or other irrigation works, based upon the ratio between the acreage owned and the total acreage susceptible of reclamation from the project.

Federal and State Statutes and decisions cited *supra.*

Under the laws of Idaho, the State Board of Land Commissioners has been vested with power and authority to carry out the provisions of the Carey Act and to determine what projects shall be undertaken, how they shall be constructed, and the amount of water that may be dedicated or used for the reclamation of the lands under such project.

Sec. 1613 et seq., Idaho Revised Codes.
State ex rel. West v. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039.
Idaho Irrigation Co. v. Pew, 26 Ida. 272, 141 Pac. 1099.
Idaho Irrigation Co. v. Lincoln County (Ida.), 152 Pac. 1058.

Provisions of a contract between the construction company and the settler conflicting with the contract between the State and the construction company, relative to the amount of water or proportionate interest in the system to which purchasers of water rights shall be entitled per acre, must yield to the provisions of the State Contract, and purchasers of water rights must be presumed to know the provisions of such contract and the statutes of the State relative to the apportionment and distribution of water under Carey Act projects.

Vague and indefinite expressions in a settler's contract under a Carey Act project as to the amount of water per acre that the settler shall be entitled to receive under his proportionate interest in the system, will not be construed as a guaranty or warranty by the construction company that such water will be available continuously during the irrigation season.

An injunction will not issue at the instance of a water user the effect of which will be to reduce the irrigable area under an irrigation project and to cancel water rights in the system held by others, merely because there is an alleged violation of a contractual right to deliver a specific amount of water, when there is no proof as to the amount of water required or that the amount of water actually delivered is not sufficient to properly reclaim the lands of complainant.

Suits in equity for the foreclosure of liens created by statute and confirmed by contract will not be enjoined in a separate action, for the rights of the party

seeking the injunction may be fully protected in the original suit.

22 Cyc. 810.

3 Elliott on Contracts, Sec. 2499.

16 A. & E. Encyc. of Law, 372.

4 Pomeroy Eq. Jurisprudence, Sec. 1370-1372.

High on Injunctions, Sec. 52.

Savage v. Allen, 54 N. Y. 458.

Wallack v. Society, 67 N. Y. 23.

Waymire v. R. R. Co., 112 Cal. 646, 44 Pac. 1086.

Utah & N. R. Co. v. Crawford, 1 Ida. 770.

Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042.

Mercantile Trust Co. v. B. & O. R. Co., 89 Fed. 606.

Smith v. American Life Assurance Soc., 1 Clarke, (N. Y.) 307.

Lane v. Clarke, 1 Clarke (N. Y.), 310.

Williams v. Brown, 126 N. C. 51; 37 S. E. 86.

Wilson v. Jarvis, 19 Wis. 597.

Dayton v. Relf, 34 Wis. 86.

Robertson v. Montgomery B. B. A., 141 Ala. 348, 37 So. 388.

Frantz v. Masterson, 133 S. W. 740 (Tex. Civ. App.)

Jackson v. Stearns (Ore.), 84 Pac. 798, 5 L. R. A., N. S. 390.

State v. McGee, 15 S. D. 247, 88 N. W. 115.

Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768.

Dyckman v. Kernochan, 2 Paige Chanc. (N. Y.) 26.
Schell v. Erie Ry. Co., 51 Barb. 368.
Hall v. Fisher, 1 Barb. 53.
Redd v. Blandford, 54 Ga. 123.

An injunction will not be granted against other actions which are merely threatened or contemplated.

High on Injunctions, Sec. 64.
Williams v. Brown, *supra.*
Wallack v. Society, 67 N. Y. 23.
Wilson v. Jarvis, 19 Wis. 597.
Wolfe v. Burke, 56 N. Y. 115.
Frantz v. Masterson, *supra.*

Equity will not enjoin the enforcement of a contract for the sale of property at the instance of the purchaser when he is in possession of all or part of what he agreed to buy.

Rischar v. Shields, 26 Ida. 616, 145 Pac. 294.
Frantz v. Masterson, 133 S. W. 740.
Childs v. Lockett, 107 La. 270, 31 S. W. 751.
Burns v. Hamilton's Admr., 33 Ala. 210, 70 Am. Dec 570.

ARGUMENT.

The decision of the District Court is not only decidedly at variance with the views expressed by the Court during the trial, but the relief granted is of a nature that both the Court and counsel for appellees seemingly conceded during the trial could not be granted in this case, particularly so in view of the

fact that only 8 out of more than 600 water users were before the Court or actually represented in the case. The colloquy between the Court and counsel set out at length in the record, pages 225 to 278, serves at least to show the contentions of the parties and the views of the Court as to the relief that could not be granted in this case, and such views necessarily influenced the parties in the introduction of evidence on the points covered by the views so expressed, and this largely accounts for the application to introduce additional evidence.

We shall refer to this more at length in another part of the argument, but at this time we desire to call attention to what the Court said at pages 270-272. The Court, referring to the argument of counsel for appellees as to the relief that could be granted, said:

> "The Court, of course, cannot compel the defendant to do an impossible thing. If the water isn't available, if the water is not there, and that is the deficiency of the system according to your views, not that the dam has been improperly or insufficiently constructed, or that the system is incomplete—that, as I understand, that the work has been done. The water supply, however, is insufficient, as you contend, and that I understand is substantially your only contention. You do not contend that the system is being mismanaged, or that you are being discriminated against. You are simply contending it has not a sufficient water supply to meet its contracts. Now, assum-

ing that the water supply is insufficient, assuming that the contract should be construed according to your contention, then what can the Court do? The Court can't require the defendant to create water, it can't do that; it could compel it to build another lateral; it could compel it to raise the dam to a higher point; it could compel it to enlarge the main canal, and it could compel it to cut out this catch basin, as it is called, possibly. It could compel it to do anything that is practicable, or that is within the range of reasonable possibility, but how could it compel it to supplement the water supply which it has, and which you contend is insufficient?"

To this counsel for appellees replied that he made no contention that the Company could be compelled to increase its water supply or to do anything that was impossible, whereupon the Court further said:

"Suppose the Court, through its officers, should collect the moneys that are due, or would, according to the terms of these contracts, become due from time to time, what could it do?"

To this, counsel for appellees replied:

"The Court in this case could compel the defendants to refrain from attempting to enforce these water contracts until they have performed, and furnished the water to which we say we are entitled, and we ask in this case that this trust deed, in so far as it may be in excess of the water supply available, be cancelled, and that these de-

fendants be enjoined from enforcing or attempting to enforce, or collecting, or attempting to collect, the water payments due, until they give us what we have bought."

To which the Court replied:

"But suppose they never can do that, would you contend that they could not claim anything against you?"

To which counsel for appellees replied, "No, your Honor."

The Court further said (272):

"How can I require your Company, in the face of the provisions of your contract, to furnish all the water to certain contract holders and withhold it from others, especially when they are not parties to the suit? * * * * Supposing I had John Jones here, who holds a contract, now, upon what theory could I require him to give up his contract? * * * * (275) Suppose there isn't water enough for even all of the cultivated lands, then what?"

To which counsel for appellees replied:

"Then, in my opinion, as between the persons who have applied the water, the doctrine of priority would determine absolutely their rights in the last analysis."

And to this the Court replied:

"That couldn't be done without having the parties before me. I suggested at the prelimi-

nary hearing that if that relief should be asked for you should bring in other parties, and you decided not to bring them in."

The foregoing is sufficient to show that both the Court and counsel regarded the absence of the other 600 or more water users and contract holders as seriously interfering with the granting of the proper relief in the event it should be found that plaintiffs had in any way been wronged or injured by any of the defendants. A motion to dismiss for want of proper parties and for want of equity in the bill had previously been overruled, and at that hearing the Court had also, as is shown from the statements in the colloquy referred to above, expressed the opinion that full and proper relief could not be granted if the situation described in the bill actually existed, without the presence of the other water users and contract holders.

Before taking up the argument as to the proper construction of the State Contract, we desire to discuss briefly whether the Court had jurisdiction to make the order or interlocutory decree entered in this case or to make a final decree in accordance therewith. Obviously, if the District Court was without jurisdiction, it will not be necessary for this Court to consider the other important questions involved in the case.

THE COURT, BECAUSE OF THE ABSENCE OF INDISPENSABLE PARTIES, DID NOT HAVE JURISDICTION TO ENTER ANY DECREE IN THIS CAUSE.

There are approximately 600 contract holders under this project holding contracts covering over 73,000 acres, whereas only eight of such contract holders, holding contracts covering about 1400 acres, are before the Court in this suit. Under plaintiffs' proof, all contracts are substantially alike as to form, and one contract is as sacred and binding as the other, and the State Contract expressly provides "that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system." (Rec. p. 49.)

This is not a class suit within the meaning of equity rule 38, for here the interest of each contract holder is opposed to any other water user being given more than a pro rata share of the available water. The interest of each contract holder is likewise affected by the cancellation or annulment of any other contract, for it increases his share of the burden of maintaining and operating the property. If 73,000 acres are irrigated from the system, each contract holder is liable for a proportionate part of the maintenance based upon the total acreage entitled to water. If the acreage be reduced to 35,000, his proportion of the expense is substantially double what

it was before. Every water user is a stockholder in the Salmon River Canal Company, holding shares in that Company equal to the number of acres owned or entered under the system. A reduction in acreage is a reduction in the capital stock of the corporation of which the water user is a stockholder. Manifestly, any decree that changes the plan of distributing the water or that gives to any person more than his proportionate share determined as provided in the State Contract, affects every water user under the project; and any suit which has for its purpose the *re-making* of the project or the accomplishing of a substantial change in the manner of distributing the water, or in the amount that shall be distributed to each settler, or that changes to any substantial degree the pro rata part of the cost of maintenance, must have before it all the parties that will be affected by the decree.

It would seem that the State of Idaho is also a necessary and indispensable party, for the Court is asked and in fact undertook to change the State Contract by reducing the acreage that shall be supplied with water from the system. There can be no denial of the fact that the State Board of Land Commissioners had the power under the law to determine the acreage that should be irrigated from the available water supply. The State Contract shows that the Land Board undertook to distribute the supply over 150,000 acres, or the entire acreage irrigable from the system. The State was the owner of the water and the Board was charged with the duty of applying it in a way that would result most advantageously to the State.

Sec. 3240, Revised Codes of Idaho (1908), provides:

> "Sec. 3240. Water being essential to the industrial prosperity of the State, and all agricultural development throughout the greater portion of the State depending upon its just apportionment to and economical use by, those making a beneficial application of the same, its control shall be in the State, which, in providing for its use, shall equally guard all the various interests involved. *All the waters of the State*, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, *are declared to be the property of the State*, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose * * * * *." (Our italics.)

This statute has been in force in the State of Idaho since the 18th day of March, 1901 (Sess. Laws, 1901, 191). The legislature has assigned to the State Board of Land Commissioners the duty of carrying out the terms of the Federal and State laws relative to the reclamation of lands under the Carey Act, and it was the duty of that Board to determine the sufficiency of the water supply and the amount of water that should be alloted per acre for the reclamation of such land. The provision of the State Contract wherein the State Board *dedicated the water to the reclamation of all the lands under that project is clearly within the power of the Board*, and there is

no authority anywhere for either State or Federal Courts assuming either the responsibility or the authority to distribute the water on Carey Act projects upon any basis other than that prescribed by the State Board. Other parts of the brief will deal more at length with the power and control of the State over the appropriation and distribution of the water resources of the State, and it is sufficient here to say that the power of the State in such matters is no longer an open question. The State, as the owner of the water set aside for this project, had the power to regulate its appropriation and use, and it had the right to designate the tribunal that should have discretion, supervision and control over the distribution and use of water on Carey Act projects, and the determination of the State Board in such matters is not subject to review by the Court; especially not, in a collateral attack on the State Contract.

The decree of the Court here appealed from vitally concerns the reclamation of the lands segregated or owned by the State. It practically re-makes the project as planned by the State Board, and directs that the water supply dedicated to the entire project shall be confined to about half of the project lands. It would seem that the State, or the State Board that made the contract involved, is an indispensable party to a suit of this character. It will be noted that the complaint was originally brought against these appellants and the State Board of Land Commissioners, but at the beginning of the trial plaintiffs dismissed the suit as against the State Board. The

printed record does not contain the order of dismissal but it will not be denied that such order was made.

We submit, therefore, that there is an absence of indispensable parties, and that the Court was without jurisdiction to render any decree in this case.

UNDER THE LAWS OF IDAHO AND THE STATE AND SETTLERS' CONTRACTS INVOLVED IN THIS CASE, A SETTLER IS ENTITLED TO HIS PRO RATA PART OF THE AVAILABLE WATER, AND HE IS NOT ENTITLED TO 2¾ ACRE FEET PER ACRE OR ANY OTHER SPECIFIED AMOUNT WITHOUT REGARD TO HIS NEEDS OR NECESSITIES.

If this Court concludes that the District Court had jurisdiction of the matter involved and that the necessary parties are before the Court to enter the decree here appealed from, a correct construction of the State and settlers' contracts becomes of paramount importance.

The right of ~~the~~ parties to contract relative to the sale and delivery of water or rights in irrigation canals, is so dependent upon the laws of the State and the public policy that obtains relative to the appropriation, sale and rental of water for irrigation purposes, that a correct construction of the contracts cannot be reached from simply an examination of the contracts without regard to the laws and public policy of the State.

It will be conceded that irrigation projects constructed under the Carey Act, under State and Federal laws and the supervision of the public authorities, have a legal status somewhat different from pro-

jects constructed by private companies and in which water rights are sold or rented. Preliminary, however, to a discussion of the Carey Act projects here involved, we desire to review briefly the development of the law relative to the sale and rental of water for irrigation purposes.

The early history of irrigation in the West shows that absolute freedom of contract originally obtained as between the company and the consumer or user. But legislation was soon demanded to correct the abuses that grew out of such a system, and in response to a demand for public supervision over the appropriation and distribution of water, Colorado in its first constitution, adopted in 1876, provided that:

> "Sec. 5, Art. XVI. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.
>
> "Sec. 6, Art. XVI. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied * * * * ."

The immediate necessity for general legislation on the subject was to some extent relieved by the decision of the Supreme Court of the United States in Munn v. Illinois, 94 U. S. 113, decided in 1877, where it was held that there was ample remedy in the common law, in the absence of statute, to protect the public against unreasonable charges and discrimination

in service. Notwithstanding the decision in Munn v. Illinois, the people of California, in their new constitution, adopted in 1879, provided that:

> "Sec. 1, Art. XIV. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law * * * * .
>
> "Sec. 2, Art. XIV. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The California constitution also contained provisions for determining the reasonable rates to be charged by corporations engaged in the sale and rental of water for irrigation and other purposes.

The Idaho constitution, adopted in 1889, followed closely the constitutions of Colorado and California on this subject. It provides:

> "Sec. 1. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental or distribution; *also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed,* is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law.

"Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city, or town, *or water district*, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The words in italics are not in the California constitution, thus showing an intention on the part of the people of Idaho to go somewhat further in the matter of regulation and control than had been done in California.

It will be noted that the Colorado constitution differed primarily from that of California and Idaho, in that in Colorado water was declared "to be the *property of the public*, and the same is to be *dedicated* to the use of the people of the State," whereas in California and Idaho the "use" of the water was declared "to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law." The distinction is now of importance only as it helps to explain the differences that have arisen in the Court decisions of these States in the construction of contracts and the right of the State to regulate and control.

The Supreme Court of California in Fresno Canal & Irrigation Co. v. Park, 129 Cal. 437, 62 Pac. 87, in upholding a water contract, contrary to the decisions of the Supreme Court of Colorado, said:

"Both sides cite cases from Colorado, some of which are favorable to the respondent's views and

> others, no doubt, favorable to some extent to the views of appellants. But the latter are, we think, mainly founded upon the provision of the constitution of Colorado, materially different from the provisions of our constitution on the subject, which declares that the water of all natural streams not theretofore appropriated is 'the property of the public.' "

The Supreme Court of Idaho, in Wilterding v. Green, 4 Ida. 773, 45 Pac. 134, decided in 1896, while following the Colorado Courts in holding that a private ditch company engaged in the sale and rental of water rights could not charge a bonus or fee for a perpetual water right, declined to go to the full extent of the Colorado decisions, and it called attention to the fact that under the constitution of Colorado water was "the property of the public." The Idaho Court said:

> "The doctrine of the Colorado Court, that the canal or ditch owner is a mere common carrier, could not, certainly, be predicated upon the provisions of the Idaho constitution. That it was the purpose and intention of the Idaho constitution to deal only with the 'use' of water, and not with the property rights of the proprietors therein, is, I think, further evidence by including within its provisions 'all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented or distributed.' The sale, renting and dis-

> tributing of the water is a dedication, and brings its use under the control of the State, but it in no sense destroys or abrogates the property rights of the appropriator therein."

The Colorado Courts, under the constitution of that State, have consistently held that the owner of a rental right was an appropriator, "through the intermediate agency of the ditch."

> Wheeler v. Northern Irrigation Co., 10 Colo. 582, 17 Pac. 487.

In Wyatt v. Larimer, etc., Co., 18 Col. 298, 33 Pac. 144, the Court said:

> "We adhere to the doctrine that such a Canal Company is not the proprietor of the water diverted by it, but that it must be regarded as an intermediate agency for the purpose of aiding consumers in the exercise of their constitutional rights, as well as ~~the~~ a private enterprise prosecuted for the benefit of its owners."

The fundamental distinction between the earlier California decisions under the constitution of that State and the decisions of the Colorado Courts may be said to be that in California greater latitude of contract was permitted, and the public control was not as complete as in Colorado. It is of little importance now whether the California Courts were correct in the construction which they placed upon the constitution of that State, but the fact remains that a necessity for a change in the law was for practical reasons demanded, and the change was eventually

brought about, first, by a radical change in the later decisions of the Courts of that State, and still later by an amendment to the statutes so as to make the Colorado doctrine applicable in all essential detail to California. The many important cases in the United States Circuit Court for the Southern District of California, before Circuit Judge Ross, furnish an interesting history of the struggle for recognition by a correct economic principle advanced before the public generally appreciated either its correctness or importance. While these decisions were at times reversed by the Circuit Court of Appeals and by the Supreme Court of the United States, the reversal always rested upon the proposition that in matters of local law the Federal Courts will follow the decision of the highest Court of the State, which in these matters had taken a narrower view of the constitution and the questions involved.

Lanning v. Osborn, 76 Fed. 319.
Souther v. San Diego Flume Co., 112 Fed. 229.
San Diego Flume Co. v. Souther, 90 Fed. 164.
San Diego Land and Town Co. v. City of National City, 74 Fed. 79.

An interesting review of the decisions of the California State and Federal Courts, and of some of the Idaho decisions bearing on the subject, is contained in the decision of this Court in Imperial Water Co. No. 5 v. Holabird, 197 Fed. 4.

The Supreme Court of California, in Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 Pac. 404, 29

L. R. A. (N. S.) 213, modified to a very large degree its former decisions, or in any event the construction that others had placed on such decisions. In the latter case, decided in December, 1909, the Court says, speaking of the owner of the ditch:

> "He, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purpose any part of this water. If he could reserve a part, he could reserve all, and thus, by his *ipse dixit*, convert a public use into private ownership; or, if he could reserve a part for himself, he could, with equal authority, give away parts of the supply to others, and by this method destroy what the Constitution itself has declared shall forever remain a public use."

In that case, one of the former owners claimed a private right in the system prior and superior to the rights of the renters or other owners of water rights. The Court again says:

> "Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental, and distribution under the constitution of 1879. He was but the purveyor

> of this public use, the agent in the execution of this public trust. If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself."

Referring to the duty of one who has appropriated water for sale or rental, the court quotes with approval from a prior decision of that court as follows:

> "Every corporation deriving its being from the Act above cited has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created."

The court also quotes from another decision of the same court as follows:

> "Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner."

The court then quotes from an Indiana case as follows:

> "No statute has been deemed necessary to aid the courts in holding that, when a person or company undertakes to supply a demand which is 'affected by a public interest' it must supply all alike who are like situated, and not discriminate in favor of nor against any."

Again the court says:

"We are not to be understood as saying that the company may not fix the limits of this territory, and lawfully agree to supply its water, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This would not be in derogation of the public trust, but would be a mere regulation of use in the performance of the trust * * * . We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the State for public rental, distribution, and sale, cannot give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the company, they are entitled to a continuation of such supply, unless their quantity shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has, fairly apportioned, between its consumers."

Even the decision in Leavitt v. Lassen Irrigation Co., supra, did not satisfy the demand in California for public control over the appropriation and distribution of water, for in 1911 the legislature of Cali-

fornia amended sec. 1410 of the Civil Code so as to provide that, "All water or the use of water within the State of California is the property of the people of the State of California", and this was followed by the adoption of the Water Code at the 1913 session of the legislature, which dedicated all waters in their natural channels to the public and declared them to be the property of the state, thus changing the law of California to conform to the law of Colorado as construed by the Colorado decisions above referred to, and also to conform to the views expressed so frequently by the U. S. Circuit Court for Southern California.

A very interesting review of the authorities and discussion of the subject is contained in the opinion of Circuit Judge Morrow in San Joaquin and Kings River Canal and Irri. Co. v. Stanislaus County, 191 Fed. 875. After reviewing the decisions in many of the western states and of the Supreme Court of the United States, the court said:

> "In these cases, the theory that the irrigation company is an intermediate agency in the execution of a public trust is necessarily based upon the doctrine that the right to appropriate water is attached to the land. The company cannot at the same time be principal and agent. It cannot own the water or the right to appropriate and sell it, and at the same time be the agent of the public in appropriating it for a public use. The logical relationship of such a company to its appropriated water is that of agent of the owner of the

land in diverting and bringing the water to the land for which it has been appropriated. But it is immaterial whether the company is deemed to be the agent of the public in diverting and carrying the waters owned by the public to the consumer who owns the right to its beneficial use, or the agent of the consumer in diverting and carrying the water to his principal for a beneficial use. In either case, while the carrier is entitled to be paid for his services as a carrier a reasonable compensation under such regulations as the law may prescribe, he is not the owner of the water carried or the water right created by its diversion, and he cannot compel the consumer to purchase it and to pay for its use, either in the way of an annual or other rate upon its supposed value as a property right * * * .

"This theory of the relation of the carrier to the water right as an intermediate agent is in accord with the law of beneficial use prevailing in all the Western States where the right of appropriation is derived from Act Cong. July 26, 1866, c. 264, 14 Stat. 251, and is there limited to some useful or beneficial purpose * * * .

"To the same effect is the desert land act (Act March 3, 1877, c. 107, 19 Stat. 377), where it is provided that the right to the use of water on desert lands 'shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation.' * *

"Sec. 8, Act Cong. June 17, 1902, c. 1093, 32

Stat. 390, commonly called the 'Irrigation Act', provides that:

" 'The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'

"The same provision has been incorporated in the laws of most of the Western States, not however, as new legislation, but as the established definition of a water right under the acts of Congress and the constitutional provisions of the states declaring that the use of appropriated water is a public use. * * * The water right must, therefore, be the right ~~to~~ of the consumer and attached to his land, and not the right of the complainant attached to the canal system. It follows that, under the law of this state, it cannot be valued as a property right upon which the complainant is entitled to an income from the water rate to be paid by the consumer. * * * I conclude that it is not a right that complainant is entitled to have valued as its property right in this case."

While the decision in the above case was reversed by the supreme court, the reversal must rest entirely upon the ground that under the laws of California in force at the time the appropriations in question were made, the appropriator acquired a proprietary interest in the water, for there can be no question but that a state can, by its constitution or statutes, provide that rights to the use of the public waters of the state, acquired after the statute takes effect,

shall not be valued in determining the value of the investment upon which the canal company is entitled to a reasonable return. Hence the decision would undoubtedly be sustained when applied to appropriations made under the present California law, or under the Idaho statute of 1901, hereinafter referred to.

We have gone thus at length into the laws and decisions of Colorado and California for they have an important bearing upon the construction of the laws of the State of Idaho involved in this case.

As heretofore stated, the supreme court of Idaho in Wilterding v. Green, 4 Idaho 773, decided May 1, 1896, followed the California decisions and distinguished the Colorado decisions, because under the laws of Colorado the waters were "the property of the public." Following that decision and in 1901, the legislature of the State of Idaho expressed itself in no uncertain terms as to the ownership of the waters flowing in their natural channels, and the right that could be acquired therein by appropriators. By this statute the laws of Idaho became for all practical purposes like those of Colorado, as construed by its highest court. The Idaho statute above referred to is now Sec. 3240 of the Revised Codes, and reads as follows:

> "Sec. 3240. Water being essential to the industrial prosperity of the State, and all agricultural development throughout the greater portion of the State depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall

be in the State which, in providing for its use, shall equally guard all the various interests involved. *All the waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State are declared to be the property of the State,* whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the State for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, *shall not be considered as being a property right in itself,* but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water." (Our italics.)

It will be noted that the trend of legislation has been rapidly and consistently towards not only public control over but public ownership of the water resources, with a supervision over the distribution and use of water not foreseen in the early history of irri-

gation, ~~that arose from~~ due to the fact that the amount of water was limited and the beneficial uses to which it could be applied were far in excess of the available supply.

The Federal legislation on the subject is equally interesting. The act of July 26, 1866, consented to the appropriation of water on the public domain for beneficial purposes wherever such appropriations were recognized or acknowledged by local customs, laws and the decisions of the courts, and it gave the necessary rights of way over the public domain for the construction of ditches and canals used for conveying water for mining, agricultural, manufacturing or other purposes. This was followed by the act of March 3, 1877, commonly known as the "Desert Act," in which the Federal Government limits desert entrymen to such water as is necessary for "the purpose of irrigation and reclamation," and this act further provided that "all surplus waters over and above such actual appropriation and use, together with the waters of all lakes, rivers, and other sources of water supply *upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*"

This act shows clearly an intention on the part of the Federal Government to conserve the unappropriated water on the public domain for the reclamation of public lands, and it may be noted here that the project involved in this case consists largely of

public lands and that the appropriation was made on the public domain for the reclamation of such public lands. The Desert Land Act was followed by provisions in the Appropriation Act of October 2, 1888, c. 1069 (25 Stat. L. 526), and the Act of March 2, 1899, c. 411 (25 Stat. L. 960) providing for investigations by the Geological Survey of reservoir and canal sites and "for the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation." This legislation was again followed by what is known as the Carey Act, being section 4 of the Act of August 18, 1894, (28 Stat. 372-422), and the amendments thereto of June 11, 1896, (29 Stat. 413-434) and other amendments not necessary to be noticed here. It was the purpose of the Carey Act to accomplish the reclamation of the public domain through the agency of the states and under state supervision and control. This legislation was again followed by the Federal Reclamation Act of June 17, 1902, under which the works are constructed and operated and controlled by the Federal Government. This Act, as construed by the Department, not only limits each water user to his pro rata part of the available water but it also contains limitations not only on the amount of land which a settler may be permitted to reclaim from the system, and makes his right to water dependent upon actual residence on the land, or in the neighborhood thereof. A water user, upon payment of all charges, acquires an undivided and proportionate interest in the system and water rights connected

therewith. The Act discourages waste in the use of water. It provides that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

With this review of the decisions and the legislation on the subject, we take up the construction of the contracts and statutes directly involved in this case.

THE CAREY ACT.

Section 4 of the Act of Congress, approved August 18, 1894, c. 301, 28 Stat. L. 373-422, granted to each of certain designated Western states, one million acres of land, such lands to be selected by the states, and segregated from the public domain, from time to time as a plan or means for reclaiming the same was found. The purpose of the Act as stated therein was "to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers."

The original act contemplated that the state itself would undertake the construction of the necessary irrigation works and use its own credit in financing the enterprise. The original act further provided that patents should not issue from the Federal Government to the state until proof was submitted that the lands "are irrigated, reclaimed, and occupied by actual settlers."

In view of the fact that none of the states could, under their constitutions, use the credit of the state for the purposes contemplated by the Federal Act, the amendment of June 11, 1896, (29 Stat. 413-434), became necessary in order to make the law of any practical value to the states. This amendment provided that "a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

This statute permitted the State to give security to contractors that could be induced to contract with the State for the construction of the works. The security was not the credit of the State which the constitution prohibited the State from using, but it was part of the assets of the Federal Government which would be donated to the State, subject to the lien authorized by the amendment, when the reclamation of the land had been accomplished. The amendment, however, did not provide that the Federal Government could retain the title to the land so pledged as security until it had been actually "irrigated, reclaimed and occupied by actual settlers", as provided in the original Act, but this part of the Act was modified by the amendment so as to provide that:

> "when an ample supply of water is actually furnished in a substantial ditch or canal, or by arte-

sian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation."

The effect of this amendment was to permit the issuance of patent to the State for the entire segregation upon proof that the necessary works had been constructed to accomplish the reclamation thereof.

The Federal Government assumed, and the Act clearly contemplated that the water for the project had been dedicated to all the lands that could be irrigated therefrom, and that each acre would be entitled to its proportionate share of the available water; and it would be a clear violation of the Federal law for the State to undertake to confine the water supply to less than the tract so patented under the Act. The State could not dispose of the lands to settlers under contracts, that would give to the settlers or entrymen more than their proportionate part of the water dedicated to the project. Such contracts would leave some of the land in a position where it could not be reclaimed from the water right upon which the Government relied when it patented the lands to the State. Clearly, it would be a fraud upon the Federal Government for the State to permit the water that had been dedicated for the reclamation of the project to be unevenly distributed, or to be diverted or used upon other lands, devoted to other uses, or restricted to the use of only some of the lands segregated. The fact that patent has not issued for

the lands involved in the present project does not alter the proposition that the State contract was entered into upon the theory that the Federal Act required the water to be distributed over the entire project pro rata.

We submit, therefore, that the Act of Congress involved in this case must be construed to require that each acre of land susceptible of irrigation from the system shall receive its pro rata and proportionate part of the water dedicated and set aside for the reclamation of the lands under the project. Any other construction will lead to conditions and situations that Congress manifestly could not have intended. This is the construction that was placed upon the Act by the legislature of the State of Idaho.

STATE LAWS.

The laws of the State provide, and they cannot be consistently construed otherwise, that a water right consists of "a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto." (Sec. 1615, Idaho Revised Codes). It will be noted also that the Idaho laws do not require any guaranty or information whatsoever as to the water supply from the contractor or construction company that contracts with the State for the construction of the artificial works required for the reclamation of lands under the Carey Act.

The Federal Act provides that the lien which the State is authorized to create in favor of the company

constructing the works must be limited to "the actual cost and necessary expenses of reclamation and reasonable interest thereon." The Act contemplated that no unusual profit should be made out of the reclamation of such lands. It contemplated that the State should be reimbursed for the actual cost of constructing the artificial works with reasonable interest, and it was permitted to subject the Federal lands to a lien for such purpose in order to obtain the necessary capital for accomplishing their reclamation. The Act did not contemplate that the settlers on such lands should be required to pay the State, directly or indirectly, for the water used thereon. The plan simply was that the Federal Government should donate the land and the State should furnish the water, and the land and water combined should be security for the cost of constructing the artificial works. We think that this is the only reasonable construction that can be placed upon the State and Federal legislation bearing on this question.

Proceedings looking to the reclamation of the lands here involved were initiated in 1907, long after the State had adopted Sec. 3240 of the Revised Codes, hereinbefore referred to, which declared that all waters flowing in their natural channels were the property of the State and that the control thereof should be in the State. Neither Congress nor the State legislature contemplated that the State, in carrying out the provisions of the Federal Act, would resort to the subterfuge of first granting the water to the promoter, and then entering into a contract

with him whereby he would be permitted to charge the settlers for the water as well as for the cost of constructing the works, with reasonable interest thereon. The statute should be very clear, indeed, before a Court would be justified in construing it so as to permit of such absurd proceedings. The State and Federal legislation clearly show an intention to accomplish the reclamation of the lands in a way that will reduce the expense to the settler and give him in effect a water right at actual cost with reasonable interest.

The Carey Act and the State laws under it are in this respect substantially identical with the "Reclamation Act" of June 17, 1902, except that that Act provides that the settler shall pay "the estimated cost of construction of the project," whereas under the Carey Act he is required to pay reasonable interest thereon in addition to the actual cost. Neither Act contemplates that the State or Federal Government can assess against the settlers a charge for the public waters of the State that have been dedicated to the reclamation of the lands. If this can be done under the Carey Act and the State laws referred to, it can be done under the Reclamation Act, thus turning those Acts into schemes for making profits out of the sale of the public waters of the State instead of beneficent acts intended for the home-builder and for the reclamation of arid lands in a way that will encourage their immediate development.

In the appendix to this brief, we have set forth so much of the statutes of the State as would seem

to have any bearing upon the questions now before the Court.

Under Sec. 1613, "the selection, management and disposal of said land shall be vested in the State Board of Land Commissioners." Sec. 1615 provides for tenders, proposals or bids for constructing works which the State may find it feasible to construct for the reclamation of the lands under the Carey Act. The request or proposal submitted to the Board by the contractor must be accompanied not by proof of ownership of water by the contractor, but "by the certificate of the State Engineer that *application* for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon." It will be noted that the only evidence of the availability of water which the Board considers is the certificate of the State Engineer and his report on the water supply. The law, of course, assumes that old appropriations cannot be used for new projects, for the water is under the constitution appurtenant to the land to which it has been applied, hence the State Engineer simply certifies that an *application* for a permit to appropriate water for this particular project has been filed in his office, the effect of which can simply be to reserve the water for the time being for use upon that project in the event the Board concludes that the project is feasible and undertakes the construction of the works.

Sec. 1617 carries out the same idea and requires the application to be of a form prescribed by the State Engineer.

The filing of the application, or the acceptance thereof and the issuance of the permit, does not, however, make the contractor the proprietor of the water or give him a proprietary interest therein. The contractor is at most but an instrumentality in the dedication of the water to the lands to be reclaimed from the proposed works. If it can be said that the settler has a title to the water or to the use of the water dedicated for such project, it may be that the contractor serves as a conduit for passing title to the use from the State to the settler. But clearly the contractor has no proprietary interest in the water. Such interest is prohibited under the constitution and Sec. 3240 of the statutes. It is manifest also that the contractor cannot sell the water for use upon other lands, neither can he use it for other purposes. The contractor, in fact, can make no use whatever of the water; he cannot even divert it from the stream except as the settlers may need it in their farming operations.

The law does not contemplate that the person making the proposal mentioned in Sec. 1615, acquires, by merely filing an application for a permit, such a proprietary interest in the water that the State cannot contract with others for the reclamation of these lands in the event the person making the proposal demands unreasonable charges or conditions. Clearly, the Board is at liberty to contract for the construction of the works with those who will make the most feasible terms or who may be "the lowest responsible bidder." Certainly the filing of the appli-

cation for a permit does not create a monopoly in the applicant that ties up the resources of the State and prevents the Board from considering the proposals of other contractors.

We submit, therefore, that the contractor is neither the owner nor the seller of the water dedicated for the project. He is simply a contractor and he is so designated in the statutes (Secs. 1621 and 1624), and he receives his pay for the work performed and material and supplies furnished in the construction of the canals, reservoirs and ditches, from the settlers upon the terms and to the amount fixed by the Board in the State contract; and his payments are secured by the lien created by the Federal Act and the laws of the State passed in pursuance thereof.

Sec. 1615 further provides that the contractor shall submit plans and specifications of the proposed works and maps showing the location thereof as well as an estimate of the cost of the works and "the price and terms per acre at which perpetual water rights will be sold to settlers in the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto." The phrase "perpetual water rights" as used in the section means neither more nor less than a proportionate interest in the canal or other works and in the rights and franchises attached thereto. This is the only construction of which the statute is susceptible, and it has been so construed by the Courts of the State. And that is also the construction that

was placed upon the statute by the Board and by those contracting with the State for the construction of such works, as shown by the State Contract involved in this case and also by the contracts that have been used in connection with other projects. (Rec. pp. 308-391.)

THE STATE CONTRACT.

The State Contract shows a consistent purpose on the part of the State Board of Land Commissioners to carry out the foregoing theory of the Federal and State legislation under which the Board was acting.

Paragraph I of the contract, Record p. 43, provides that the Land and Water Company "agrees to construct and build those certain irrigation works * * * * and to sell *shares* or *water rights* in said canal and irrigation system * * * * to the person or persons filing upon the lands hereinafter described * * * * , said *shares* or *water rights* to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of *shares* or *water rights* as hereinafter provided."

Manifestly, "water rights," as used in the foregoing paragraph and as used throughout the contract were intended to be synonymous with "shares," for it could not have been intended to leave it optional with the Land and Water Company, whether it would sell *shares* in the canal and irrigation system, or *water rights* therein, or *shares* to some and

water rights to others, and the last sentence of the paragraph requires the Company to turn over the management and control of the system to the purchasers of "shares" or "water rights." If the terms are not synonymous, was the management to be turned over to the purchasers of the *shares* or to the purchasers of the *water rights?*

The paragraph further shows that the contractor was to build the works and to sell shares therein to all entrymen and owners of land susceptible of irrigation from the system. It was given no option or discretion except that its agreement to sell shares or water rights was restricted to lands under the system. Manifestly, this could not be carried out unless the water supply was dedicated to the entire project so that each acre of land was entitled to the same proportionate share of the water supply. If the contractor had the option of applying to some of the land more than its proportionate part of the whole, then there would necessarily be descrimination between the entrymen and the appropriation made for the project might be exhausted before all the entrymen had been given an opportunity to purchase shares or water rights for their lands.

Paragraph IV of the contract, Record p. 47, has "Appropriation of Water" as its heading, and it deals with the "appropriation" which is frequently referred to throughout the contract. The term "appropriation" as used in this contract, does not mean the varying or fluctuating quantity of water that may actually flow in Salmon river at different sea-

sons of the year, but it refers to Permit No. 2659, or the 1500 cubic feet per second appropriated for and dedicated to the use of this project, which appropriation the contract shows should be used for the irrigation of 150,000 acres. That is the acreage which the State Engineer's report on the project shows was irrigable therefrom (Exhibit "F," Rec. pp. 388-391), and 1500 second feet distributed over 150,000 acres would be the equivalent of one one-hundredth of a second foot per acre.

The State Contract shows clearly that the State Board of Land Commissioners intended to reclaim 150,000 acres of land with the appropriation evidenced by Permit No. 2659. The contract states that this water shall be "used for the irrigation of the lands described in Exhibit "A" herewith, together with other lands susceptible of irrigation from said system, *which water right is hereby dedicated for use upon said lands.*" This language leaves little room for contention that the water could be confined to only part of the lands.

It is further provided in this paragraph that the reservoir shall have an impounding capacity of 180,000 acre feet, but the statement which follows, viz., "which amount, in addition to the normal flow of said stream during the irrigation period, has been determined to be sufficient to furnish 2¾ acre feet of water per acre for each acre of land irrigated," is simply a statement of the opinion entertained or determination made by the State Board and is not a covenant or agreement on the part of the contractor

to forever guarantee that there shall be that amount of water available in the stream for use upon this project. The covenant of the contractor comes in the last part of this paragraph, viz., "and the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof *at the rate* of one hundredth of a second foot per acre for each acre of land to be irrigated." The contractor had previously agreed to build a reservoir with a capacity of 180,000 acre feet, and the record is undisputed that it has been constructed with a capacity of 185,000 acre feet (Rec. p. 191). The part just quoted simply covers the capacity of the canals and lateral system. It has nothing whatever to do with the contractor guaranteeing the water supply. It means what it says, that the *structure shall have a carrying capacity sufficient to deliver*, not that the contractor shall deliver, water at a certain rate of flow, a provision that is highly proper and essential in any contract dealing with the construction of irrigation works. Instead of setting forth the grade and dimensions, in feet and inches, of the different structures, the Board very wisely uses general specifications that are far more satisfactory and require a great deal less detail calculation, and it thereby eliminates the possibilities of error that would otherwise be involved therein; the specifications for the capacities of the numerous ditches, laterals and canals are here set forth in one sentence.

Paragraph VI deals in part with the same subject

matter and carries out the same plan of applying the water to all the lands under the project. The statement (Rec. p. 49) that the contractor agrees "that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are opened for entry and settlement, it will sell and contract to sell water rights or shares for land to be filed upon," has reference to the water appropriation described in Paragraph IV, viz., Permit No. 2659. It cannot be possible that the Board intended to leave "the extent of the water rights" to which the company might sell shares in the system to be determined after the shares had been sold and the lands entered and improved by the settlers. Had that been the intention, the contract would not have been *silent* on a matter of such importance. Such construction of the contract would be most unreasonable; such action on the part of the Land Board would be most reprehensible, and it is entirely inconsistent with the provisions of the law that the State Engineer shall investigate and report on the sufficiency of the water supply before the segregation is made. This provision of paragraph IV is a requirement that the contractor shall accept applications for shares or water rights in the system to the extent of the appropriation that had been made for the project and to the extent of the capacity of the works which it had undertaken to construct, and is also a limitation that it should not sell beyond such capacity, which the contract shows had been fixed at 150,000 acres.

The latter part of the paragraph makes certain that there can be no preference or priority between water users under the project and that each purchaser is only entitled to his proportionate interest, for it provides that priority of entry gives no preference over subsequent purchasers "but shall entitle the purchaser to a proportionate interest only therein;" and as if to emphasize and make doubly sure that no purchaser could misunderstand the interests that he would acquire the Board again declares that, "*the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system.*"

Our contention that the appropriation set aside for this project was dedicated to all the lands to be reclaimed from the system, is also sustained by Paragraph VIII of the State Contract (Rec. p. 50). There again the contractor is required to sell shares and interests in the system to *all* persons entering Carey Act lands, to purchasers of State lands, and to owners of other lands under the system, the only limitation being that the land must be susceptible of irrigation from the system; and each purchaser is to be given "the right of possession and enjoyment" of his interest. This paragraph also states that each share or water right shall represent "a carrying capacity" sufficient to deliver water at the "rate" of one-hundredth of a cubic foot per second, and that each share or water right shall also represent "a proportionate interest" in the canals, water rights and franchises, based upon the number of shares finally sold.

The declarations or statements regarding capacity and what a share or interest represents are all based upon the plan of irrigating 150,000 acres by the appropriation made for this project. Based upon that plan the various definitions of a share or interest mean one and the same thing. That is to say, each acre of land would be entitled to 1/150,000 part of the appropriation, which could not exceed 1/100 cubic foot per second for each acre, but there was no guarantee either on the part of the State or on the part of the contractor that Providence would provide that amount of water each and every year as long as water could be beneficially used upon the lands under the project, or that the contractor would do so if others failed. The statements in this paragraph, insofar as they relate to the contractor, are important only as they again fix, in general terms, the capacity of the canals and prohibit the contractor from discriminating between applicants for the purchase of shares or interests in the system.

The latter part of the paragraph (Rec. p. 52) permits the contractor to sell "shares" or "water rights" on terms more favorable than one-fifth in cash at the time of purchase and the balance in five annual installments, but this option cannot be construed to permit the contractor to enlarge upon what a share or water right shall represent. To do so would defeat the very purpose of the contract and would confine the system to a smaller acreage than the State proposed to reclaim under this project. The limitation that the contractor shall not sell "beyond the

carrying capacity of the canal or in excess of the appropriation of water therefor," does not mean that the State has not determined the acreage that may be reclaimed from this project. It means simply that the system must have a carrying capacity of 1/100 of a cubic foot per second for each acre, and that the sales shall not exceed 150,000 acres, which is the limit of "the appropriation of water therefor." The term "appropriation" as used in this sentence means the permit for 1,500 second feet; it does not mean an unknown and varying quantity of water flowing in a stream, the amount of which is to be determined in the future after the lands have been entered, settled upon and improved.

Paragraph IX of the State Contract provides that the Operating Company shall have a capitalization of 150,000 shares, "which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal," thus again emphasizing the acreage to be reclaimed and what each share or water right represents.

Paragraph X simply relates to the form of certificate to be issued by the Operating Company. It is not a covenant or agreement on the part of either the contractor or the State as to the amount of water available. The Operating Company is the permanent organization that is to operate, control and hold title to the canals and water rights. Each settler will hold certificates of stock in that corporation as permanent evidence of his interest in the system. The State having provided for the incorporation of that

Company, states briefly in this paragraph what shall be stated in the certificates of stock which the Operating Company shall issue to the settlers. It could be of no importance to the contractor that constructs the system what sort of certificates the Operating Company gave the settlers. Ordinarily it would be a matter for the settlers themselves to determine when they formed the corporation, but in this case the State provided that the corporation should be formed before there were any settlers, and hence the State Board undertook to determine what would ordinarily be determined by the incorporators or directors. There is nothing in this paragraph inconsistent with the balance of the contract that each settler shall receive an undivided and proportionate interest in the system, which if completed so as to irrigate 150,000 acres would entitle each acre of land to 1/150,000 of the water appropriation for the project.

As a matter of fact, however, as the project now stands, each acre of land receives a far larger percentage of the appropriation, for the total acreage sold is 73,348 acres and no further sales are being made, hence each settler receives more than twice the proportion of the water appropriation originally contemplated, and the capacity of the system is far in excess of what the contract provides it should be per acre (Rec. pp. 192, 220).

We submit, therefore, that there is nothing in the State Contract that conflicts with either the Federal Act or the laws of the State relating to projects of this kind, or that promises or undertakes to give to

a settler more than his proportionate part or interest in the canal system and water rights dedicated to the project.

THE SETTLERS' CONTRACT.

The settlers' contract so repeatedly states, reiterates and emphasizes that it is made *pursuant* to the terms of the State contract and the laws of the State under which said contract was made, that there can be no basis for the contention that the settlers' contract gives to the settler a larger or different interest than the State contract provides he shall receive. This contract states (Rec. p. 63) that the State Board has notified the contractor that it may proceed to sell "pursuant to law and to the terms of said contract with the State." This expression is repeated on page 64.

This contract sets out the form of the certificate of the Operating Company, and it contains the provisions required which the State contract provided should be therein set out. It is true that the certificate states that "this certificate entitles the owner hereof to receive 1/100 of a cubic foot of water per acre per second of time for the following described land," but it also says that this shall be "in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land & Water Company," and that it entitles the owner "to a proportionate interest in the dam, canal, water rights, and other rights and franchises" of the Land and Water Company, based upon the number of

shares finally sold "in accordance with the said contract between the said Company and the State of Idaho."

We submit that there is nothing in the contract that can upon any possible theory be construed as a guarantee on the part of the contractor that the Operating Company will continue for all time to deliver to the land owners 1/100 of a cubic foot of water per acre. The absurdity of such contention is manifest when we remember that the settlers are the stockholders of the Operating Company and the contractor has no control over it, except for a very short period or until a majority of the settlers have paid as much as 35% of their deferred payments. The settlers' contract, however, emphasizes the fact that it is made pursuant to the terms of the State contract, and we respectfully submit that nothing could legally be inserted in the contract between the contractor and the settler that would modify or vary the interest which the settler acquires in the system or the amount of water that he should receive per acre. Insofar as these matters are concerned the State contract is the fundamental law and anything in the settlers' contract in conflict therewith would necessarily be void and ineffectual.

For the reasons stated, the construction which the District Court placed upon the settlers' contract not only conflicts with the provisions of the State contract, but with the provisions of the laws of the State and the Federal Acts relating to Carey Act projects. The settlers' contract is comparatively unimportant

in this litigation, for it must necessarily yield to the State contract on the matters here involved. Contracts similar to the ones now before the Court, and also the laws of the State and the Federal Acts relating thereto, have been repeatedly before the Supreme Court of the State of Idaho and have been construed by that Court, and the decisions of the Supreme Court of the State will be followed by the Federal Courts in matters of local law and the construction of contracts like those now before the Court. We pass, therefore, to a consideration of the Idaho decisions.

THE IDAHO DECISIONS.

The questions here involved first came squarely before the Supreme Court of Idaho in State ex rel. West v. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039. The Twin Falls Canal Company was the operating company under the original Twin Falls Carey Act project constructed by the Twin Falls Land and Water Company under its contract with the State of Idaho, a copy of which is set out in full, pp. 337 to 457 of the record in this case. The case arose after the contractor had completed the system and after the operating company had taken possession and control thereof. West, a purchaser of State lands under the project, made application to the operating company for water for the irrigation of his lands, offering to purchase upon the terms of the State Contract. The operating company declined to sell him any interest in the system or to furnish him any water because it contended the system was already over-sold and that it could not deliver to the settlers who had

already acquired rights in the system the amount of water specified in the State Contract or in the settlers' contracts. West made the same contention that we are making here, that each purchaser was only entitled to an undivided proportionate interest in the system and water rights appurtenant thereto and that the water appropriation had been dedicated to the entire project and for the benefit of all the lands. The Court explains the procedure in Idaho relative to Carey Act projects and the reason for providing for an operating company to assume the management of the system when the works have been completed by the contractor. Referring to the particular questions here involved, the Court says:

> "By the terms of the contract between the State and the Land and Water Company, *the water appropriated was dedicated to the lands segregated and to the school lands within the segregation.*" (Our italics.)

Referring to the provision of Sec. 1615 of the Idaho Revised Codes, which says that the perpetual water rights mentioned in said section shall "embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto," the Court says:

> "The term 'rights and franchises,' as used in that section, means water rights as well as all other rights, including dams, canals, ditches, laterals, etc., and the interest which the purchaser of a water right has, not only in the irrigation

works, but in the water rights as defined by that section of the statute, is a 'proportionate interest.' Thus said statute contemplates that each owner of a water right has a proportionate interest in said entire irrigation works."

The Court refers to the fact that it is the duty of the State Engineer and the Land Board to determine whether there is sufficient unappropriated water in the source of supply, and if the Board passes favorably upon the supply and considers favorably the plan of reclamation proposed by the contractor, it may enter into a contract for the construction of the necessary works of reclamation. In reference to the construction work, the Court says:

"Under the provisions of the statute, the completing of said works is supervised by the State, and ultimately the works must be turned over to the settlers, *thereby providing a kind of muncipal ownership.*

"Under the rules and regulations of the Land Board, adopted October 16, 1909, the relation of the builder of the works to the project is set forth as follows: 'The company entering into this contract with the State is related to the undertaking simply as a construction company, whose duty it will be under the provisions of the State law and the terms of the contract to build a canal under the supervision of the State, the money spent in such construction being secured by the land which the canal is designed to irrigate.' "

Taking up the matter as to where the settlers' water should be measured, the Court quotes with approval from one of its prior decisions as follows:

> "Under the law, water of all claimants must be measured at the point where such water is diverted from the natural channel of the stream from which it is taken. This is a matter of necessity demanded by public policy. It is the policy of the law to prevent the wasting of water."

There, as here, it was contended that the water should be measured at the point of delivery into the consumers' lateral. In that case the Board had dedicated or set aside 3,000 cu. ft. per second for the irrigation of 240,000 acres. The provisions of the contract relative to the delivery of water to the settlers were substantially the same as they are in the case at bar. The Court, however, held, that in view of the fact that a certain amount of water had been dedicated to a certain acreage, the loss and evaporation would have to be distributed pro rata over the acreage as there was no provision in the contract for diverting from the river any excess to cover such losses. The decision, therefore, is directly contrary to the decision of the District Court in the case at bar, which holds that the water shall be measured "at the points of delivery from the system into the consumers' laterals." (Rec. p. 393.) In fact, it is apparent that the learned District Judge had not considered the decisions of the Idaho Supreme Court in either the West case or the other cases that we shall hereafter refer to.

Referring to that part of the State Contract wherein the contractor agreed "to sell or cause to be sold to the person or persons filing upon any of the lands herein described, or to the owner of the other lands not described herein but susceptible of irrigation from its said canal system," the Court says: "This paragraph of the contract is a specific promise to sell water for State lands." In other words, the Court construed the contract to mean that the contractor had no discretion in the matter of restricting the sale of water rights to a lesser acreage than that which was susceptible of irrigation from the project and for the irrigation of which the water appropriation had been dedicated by the State.

Referring to the provisions of the certificates of stock of the operating company which in that case provided that the purchaser was entitled to one-eightieth of a cubic foot per second continuous flow, the Court said:

> "The provisions to be contained in said certificates of stock, above quoted, if taken alone, may be a little obscure; but taking the whole contract together, it does not provide for a constant or continuous flow to each 80-acre tract of a cubic foot of water per second of time, for, as above shown, said water right and system were not sufficient to deliver a constant flow of that amount of water after deducting the loss of water occasioned by seepage and evaporation. * * *
>
> "Said provision clearly contemplates that the irrigators shall use said water 'in turn' or 'by

rotation', if that method will best protect and serve the interests of all users of water from that system."

Referring to the matter of determining the water supply before the segregation is made and the construction of the project is undertaken, the Court says:

"The Land Department of the United States must have considered those facts before it came to the conclusion that said amount of water was sufficient to reclaim said land. If it had not come to that conclusion, it would not have segregated the land included in said project on the showing made by the State. The State Land Board must have concluded from those facts that the water appropriated was sufficient for the reclamation of said land, or it would not have entered into said contract for the construction of said irrigation system. And, further, there is nothing in the record to show that said amount of water is not amply sufficient to properly irrigate all of said land if used in turn by the owners of the land or under a proper system of rotation."

The last part of the above quotation would seem to settle the proposition that it is the amount required rather than the amount stated in the contract that should be considered in cases of this character, and that the water user has no right to complain even though he does not receive the amount specified in the contract if he is nevertheless receiv-

ing sufficient to properly irrigate his land under a proper system of rotation.

Referring to the provision of the contract that the contractor should not sell shares or water rights in excess of the carrying capacity of the system or the appropriation made for the project, the Court says:

> "That provision of the contract prohibits water rights or shares to be dedicated to any of the lands included within said project or sold for any lands beyond the carrying capacity of the ditch, and also in excess of the appropriation of said 3,000 second feet of water. It prohibits *the sale of more* than one-eightieth of a second foot per acre to any of said lands, and also prohibits the sale of any part of said 3,000 second feet of water for the irrigation of lands outside of said project, *as said contract clearly contemplates that said appropriation of water shall be devoted exclusively to the irrigation of lands within said project.*" Our italics).

Referring to the contention of the operating company that each settler was entitled to a continuous flow and that he could not receive one-eightieth of a cubic foot per second if any more water rights or shares were sold in the system, the Court says:

> "There is nothing in that contention. Under the contract the interest of the settler is a proportionate interest in the entire canal system and the water appropriation. *If there is a loss, he must stand his proportionate part.* 3,000 second

feet of water were appropriated for 240,000 acres of land, or one-eightieth of a second foot per acre at the point of diversion. * * * The maximum amount of water provided for is one-eightieth of a second foot per acre. The user's right to water up to the maximum of 5/8 of an inch per acre depends upon his actual necessity for the production of his crops, and the only method under the contract by which he could receive that amount would be by the rotation system.

"It is suggested by counsel that the settler should be given substance under this contract and not shadow; water and not carrying capacity in the canal system. The settler is entitled to receive just what the contract entitles him to receive,—nothing more, nothing less."

The court then discusses the advantages and merits of the rotation system, and shows why an irrigation system should have a capacity in excess of the amount of water it can deliver by continuous flow, answering fully and completely the opinion of the learned District Judge in this case on that point. After showing that by the rotation system there would probably be sufficient water for all, the court says:

"And even if there is not, under the provisions of said contract, *each land owner owns a proportionate part of said irrigation system and said water, and in times of shortage he is only enti-*

tled to receive his proportionate share of the water. The water supply for said system has been decided by the State authorities to be sufficient to amply irrigate all of the land within said project, and there is nothing in the record that contravenes that view. * * * And further, under said contract, the settler owns a proportionate share of said canal system and the water appropriated for the irrigation of the land within said project." (Our italics).

A rehearing was granted, but the Court declined to change its views.

The opinion was again approved in a similar case involving the same defendant, on September 25, 1915, in the case of State, et al., v. Twin Falls Canal Company, 151 Pac. 1013. In the latter case, the Court, after stating the facts and referring to its prior decision, says:

> "These facts were fully considered by the court, and the conclusion was reached that they did not constitute the defense to plaintiff's cause of action.
>
> "Upon the authority of the said case of State v. Twin Falls Canal Co., supra, we conclude that the answer in this case does not state facts sufficient to constitute a defense."

Some phases of the questions here involved were before the Idaho Supreme Court in the case of Idaho Irrigation Co. vs. Pew, 26 Ida. 272, 141 Pac. 1099. The questions arose on demurrer to a complaint to

foreclose the lien under a settler's contract. The Court considered what was included in a Carey Act lien, and it was held that under the Federal Act, as well as the State law, the lien was for construction and not for the sale of water. After quoting from the Act of Congress of 1896, amending the Carey Act, the Court says:

> " 'This actual cost of reclamation' in any given case was evidently intended by the act to be determined by the State, and that determination would at least constitute prima facie proof that the amount the State allowed the company to charge and collect for a water right was the 'actual cost' within the purview of the Act of Congress. The Carey Act authorizes the State itself to reclaim the land or to contract with a corporation to do so. The presumption must be that the State will act fairly and justly, and that the price it permits to be charged and collected is clearly within the direction and authority of the Congressional Act. * * *
>
> "Before the State and the construction company can enter into any contract for the reclamation of a tract of land, they must have agreed upon the estimated cost of construction and the corresponding price to be charged for water rights, in order to defray such cost. That agreement as to cost is the basis of the contract between the company and the State. Again, when the company first comes into relation with the settler, it must have contractual assurance from

him that he will reimburse it for his share of this estimated cost, and the settler on the other hand must be safe-guarded by a fixed contract price for the water right if he enters upon the land. This arrangement impresses us as not only unavoidable in the very nature of the conditions existing, but as eminently fair and just to all parties. If the prospective settler considers the estimated cost of construction excessive he need not contract for the purchase of water rights under that project. He is under no compulsion to contract with the company at all. He is not dependent on the company when he makes his contract with it, for the law does not permit him to enter the land before he makes the water right contract."

Some of these questions were before the Court in Bennett vs. Twin Falls Northside Land & Water Co., 27 Idaho 643, 150 Pac. 336. The Court there says:

"Under the constitution and laws of the State the ownership of the *corpus* of the water is in the State and it could not be successfully contended that anyone could make 'dedication' of something not owned by him. * * *

"Under the provisions of Section 3240, Revised Codes, it is declared that all of the waters of the State when flowing in their natural channels, including the waters in all natural springs and lakes, within the boundaries of the State, are the property of the State. * * *"

The Court, referring to the relation of the contractor to the State and the settlers, says:

> "Said Land and Water Company is simply a Carey Act construction company, formed only for the purpose of acquiring a right to the use of water which it temporarily holds, in a certain sense, as trustee for the prospective entryman, and which water right the entryman perfects by the application of the water to the reclamation of such lands. The Land and Water Company at no time has a perfected water right in the sense that it has applied the water to the reclamation of land. In fact, it would be impossible for it to perfect the water right, as it holds no land upon which the water could be used, and it only complies with the legal forms in the initiation of the water rights for and on behalf of the prospective settlers, while the settlers, by an application of the water to a beneficial use, perfects the water right and keeps and maintains the same alive, or prevents, by the use of water, such right from lapsing."

The last expression of the Idaho Supreme Court on the subject is in the case of Idaho Irrigation Co. v. Lincoln Co., 152 Pac. 1058. The question there was as to whether the contractor or construction company was liable for the payment of taxes on the system before it had been turned over to the operating company or settlers. The Court in holding it was not liable for taxes, says:

"It is clear from the provisions of said Carey Act and the amendments thereto and the statutes of the State applicable to said Act that companies like the defendant are treated by the State as, and are in effect nothing but, construction companies engaged in constructing irrigation works under contract with the State, and their remuneration is limited by the provisions of the Carey Act and the provisions of Section 1629, Rev. Codes, to the actual cost of construction and the necessary expenses of reclamation and reasonable interest thereon.

"It has been the custom of the State Land Board at the time a contract is entered into to fix a sum which shall represent such actual cost of construction, and this practice has been upheld by this Court in the case of Idaho Irr. Co., Ltd., v. Pew, 26 Idaho 272, 141 Pac. 1099. It is apparent that the law does not intend that profit shall accrue to the construction company, and it is clear that the construction company is not the owner of the works constructed by it nor of the water right connected therewith, for under the provisions of said Section 1629 the construction company is given a first and prior lien on the water right and land upon which the said water is used for all deferred payments for such water right, and under no reasonable construction of such law can it be held that the construction company is the owner of either the water right or the system, but is only given the right to sell them

for the purpose of reimbursing it for the cost of construction.

"The only means of remunerating the construction company is by the sale of the water rights. The State Land Board fixes the price per acre to be charged for such water rights by dividing the cost of reclaiming the land by the number of acres to be reclaimed, and when all of the water rights connected with such system have been disposed of, the construction company has, at least in theory, been reimbursed for its outlay, provided that purchasers of such water rights pay the purchase price for them. The water rights unsold cannot be considered in the ordinary sense of assets of the construction company, since water rights remaining unsold represent rather a liability of the construction company which can only be met by the sale of the water rights as provided by law."

Referring to the interest of the construction company in the works and water rights, the Court says:

"The construction company's interest in the reservoirs, dams, water rights, etc., is represented by the lien provided by law to cover the *cost of construction.* Said Section 1629 authorizes the State to create a lien to cover the cost of construction, with interest, and this lien represents the amount of money which the company has expended on which it has not received any return from those purchasing water rights."

It is settled by these decisions, and the law could not be construed otherwise, that the construction company receives no pay for the water; that its remuneration is entirely for the structures which it builds and the supplies and material which it furnishes. It is referred to in the laws, in the contracts, and in the Court's decisions as the contractor or construction company. When it contracts with the State for the building of certain works, the cost of such works are estimated as nearly as practical by all parties; the State Engineer reports thereon and acts as the advisor of the State Board of Land Commissioners. After the cost of construction has been determined it then becomes equally important to determine the acreage that may be irrigated from the system, and with this data before them the parties proceed to ascertain the price per share or acre that should be charged for water rights or shares in the system. The plan of determining the price per acre or the price of shares or water rights shows conclusively that the Board must determine before the State contract is entered into, the acreage to be reclaimed from the system. If the acreage is large the cost per acre will be less. If the acreage is to be small the price per acre must be proportionately increased.

On every hand there is evidence and confirmatory proof of the correctness of our position that the water appropriation is dedicated for the entire project and that there is no authority in the construction company any more than there would be in other

contractors to change the plans after the contract has been let. Indeed, it is required to give a large bond "for the faithful performance of the provisions of the contract with the State" (Section 1621).

We shall next consider briefly the decision of the District Court in this case.

THE DECISION OF THE UNITED STATES DISTRICT COURT.

We shall not undertake to review in detail the decision of the learned District Judge. Substantially all that has already been said regarding the construction of the State and settlers' contract is in answer to the construction placed on those contracts by the District Court. The decision rests almost wholly upon the form of certificate issued by the Salmon River Canal Company and upon what the Court assumes must have been the moving cause for the settlers to enter into contracts with the Land and Water Company. The opinion does not refer to either the State or Federal laws, or to the decisions of the Supreme Court of the State construing similar contracts. The Court apparently considers a number of matters wholly outside of all contracts but from which the Court concluded, without any evidence to sustain it, that the settlers must have believed they would receive a certain specified amount of water.

The Court says:

> "Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the company would give no promise of a sufficient supply, no

assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole, and no guaranteed limit upon the number of acres for which water rights would be sold."

That the Court had an imperfect view of the situation is apparent. Substantially every declaration or statement made in the foregoing quotation rests upon an erroneous assumption and is unsupported by any proof in the record. The Court based its decision upon the erroneous assumption that the company was the only source of information available to the settler or purchaser. It erroneously assumed that the construction company was the persuasive power that induced the settler to buy, when the record shows that none of the plaintiffs in this case had had any dealings whatever with the construction company, but purchased from others after the condition of the water supply was substantially as well known throughout the community and by the public generally as it was at the time of the trial.

The Court erroneously assumed that these practical men of affairs, determined, as it says, to know that they would get water and not simply promises or indefinite and undivided interests, ignored or passed by all public, reliable and disinterested sources of information and went direct to the construction company—the one concern that was the most interested of all in selling water rights, and that they accepted the expressions in the settlers' contract as a positive guaranty that the water supply was sufficient.

The settlers must be given credit for having acted more intelligently than the Court assumes they did in this case. The settlers knew, and the contracts which they signed so stated, that:

1. The irrigation project had been found feasible by the Federal Government and that the lands had been segregated from the public domain for reclamation from this project because the water supply was deemed insufficient.

2. That the State Board of Land Commissioners, acting for the State of Idaho, had applied for the segregation of the lands and contracted for the construction of the project after the State Engineer had reported that the water supply was sufficient and the irrigation works of the kind and character required to properly reclaim the lands, and they knew that the State Board would not have entered into the contract with the construction company if it had not believed that the available water was sufficient for the proper reclamation of the lands.

3. That the project had been approved by both the State and Federal authorities.

4. That faith and confidence could well be placed in the project because the published reports of the Land Board contained a rule and regulation stating that (Rule 11):

> "It will be the policy of the Board to guard well the interests of the settler and to that end holds that the 'inauguration of work by the contractor,' referred to in Section 1625 of the Revised Codes, shall mean that proper arrangements shall have

been made for carrying on the work of construction, and that the actual work of construction shall have begun on a scale reasonably commensurate with the magnitude of the undertaking before any portion of the land will be declared open for public entry."

That the lands were thrown open for entry under a notice published by the State Board under Section 1625 of the Idaho Revised Codes, which provided that:

"Sec. 1625. Immediately upon the withdrawal of any land for the State by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the Board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the State capital, for a period of four weeks, to give notice that said land, or any part thereof, as the Board in its discretion may deem is for the best interest of the State, is open for settlement, the price for which the said land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works."

The settlers primarily wanted land, the water without land being of no value to them, and having selected the land that they desired to enter, they were advised by the rules of the Board and the statutes of the State that they could not file upon such land

until they had entered into a contract with the construction company for shares or interests in the system that would give them a water right sufficient to reclaim the land. The published notice of the State Board under Section 1625, *supra*, stated "the price for which such land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works." The settlers, therefore, simply went to the construction company as part of the routine required in perfecting the entry and asked for a contract. There was nothing to negotiate about. The price and terms of purchase were fixed and were alike to all.

The prospective purchaser was in the vicinity of the project. He could investigate for himself or obtain information from disinterested parties in the community, and we submit that the only reasonable conclusion that can be drawn from the circumstances and facts surrounding the signing up of settlers' contracts is that the purchasers were influenced by the matters set forth above, and not by the statements in the water contracts.

The Court erroneously assumed that there was no *limit* to the number of shares or water rights that could be sold when as a matter of fact the State contract repeatedly limits the amount to 150,000 acres. That was the limit of the capitalization of the operating company; that was the limit of irrigable land under the project as shown by the report of the State Engineer; that was the limit of the water appropriation.

It is incredible that any purchaser should have acted upon the theory or along the lines suggested by the District Court. Those familiar with practical affairs know from experience that persons buying water rights are not so easily satisfied. What possible reason is there for believing that the prospective purchaser would not be influenced by the matters set forth above, but would accept in lieu of the information available from those sources and the assurances afforded by those facts, a vague promise of a construction company, which, upon the Court's theory, was making promises far beyond its financial responsibility. There is no allegation or proof that the settlers relied upon or had any reason for relying upon the statements of the construction company, or that they believed any of its representations. The fact is undeniable that the purchasers and the seller were strangers to each other and were dealing at arms' length.

It is incomprehensible that any large number of persons should have entered into contracts upon the theory suggested in the opinion of the learned District Judge. The Court is clearly wrong when it says that the purchasers accepted as satisfactory and sufficient evidence of the sufficiency of the water supply what the Supreme Court of the State of Idaho in the West case called the "obscure" language of the stock certificate of the Salmon River Canal Company, contradicted in so many places by the positive provisions of the State contract. If that is the only assurance the settlers had, it is strange, to say the least, that

none of them should have demanded a bond or undertaking from the contractor to make good this alleged ambiguous guarantee. In the language of the learned District Judge, his reasoning on this point "is not convincing."

It seems highly improbable that any large number of people would have signed the settlers' contracts had they not had some other assurance concerning the water supply than the meager statements contained in the settlers' contract. It would seem that they would at least have demanded positive and specific language expressing the obligations of the contractor to furnish or deliver what they contend the contract provided they should have. Had the parties intended to provide for matters of that kind, it would have been a simple matter to have expressed it in language that could not have been misunderstood. In fact, it is difficult to see how it could be stated in language that would be less expressive of such an intention.

The conclusions of the District Judge that the contractor undertook to guarantee the water supply are so inconsistent with the public policy of the State and of the West generally in the construction of irrigation works and the reclamation of arid lands, that the construction which the Court placed on the contract ought not to be accepted unless the language be so clear and definite as to permit of no other construction. Under the Court's theory the average or minimum flow of a stream for a series of years is wholly unimportant in determining the area that

may be reclaimed, or the feasibility of an irrigation project. Upon the Court's theory the lowest or minimum flow of the stream is the only matter to be considered and that would determine the limit of reclamation of arid lands, for obviously no contractor or responsible concern would knowingly enter into obligations that it could not fulfill and that would subject it to damages if it failed to do so. Hence, the limitation of irrigation development would be based on a water supply somewhat under the minimum flow of the stream—there would be a factor of safety beyond which it would not be considered safe to go.

Were the theory of the District Judge to be applied to projects generally, much of the land that is now being reclaimed in all parts of the West would be unreclaimed. It is safe to assume that the State Board of Land Commissioners did not intend to develop the State upon that theory and that they did not undertake this or any other Carey Act project upon such theory. The Board was attempting to find the largest acreage that it was practicable to reclaim from the available water, appreciating the fact that late in the season or in years of drought there might be less water than the crops would require in order to yield the maximum returns, but the loss when distributed equitably over the project would not be great as to any one individual, and the farming would still be profitable.

Under the statutes of the State, the contractor gives a bond to complete the construction of the works in accordance with the State Contract, but he gives

no bond to protect the settlers under the alleged guaranty of the water supply. The construction company has no control over the project after it is completed. Its operation and control is in the hands of the operating company, the stock of which is owned by the settlers. Is it at all reasonable to assume that any responsible concern would assume the obligation of delivering water to the settlers when it has no control of the system? Is it reasonable to assume that the settlers would attach any importance or value to any promise or guaranty of that kind from a concern that is not to have control of the system, a concern that is created and organized solely for the purpose of constructing the works, after which it dissolves or moves on? The learned District Judge assumes that settlers are far more credulous than human experience has shown them to be. No one will purchase a parcel of land, however small and of which he may obtain immediate possession, simply upon the strength of the warranty of the seller. He will insist upon an abstract of title, and if he finds the title imperfect he will refuse to buy, regardless of the offer of the seller to warrant the title.

It should be noted that in none of the contracts are there any provisions limiting the alleged guaranty of the Land and Water Company. It is unlimited both as to time and causes. It is reasonable to suppose that had there been any intention to make any guaranty whatever, there would be some provision as to the time it should run, or the furnishing of a bond, or the giving of some security to make the

guaranty good, and some restrictions as to the causes against which the contractor would not guarantee the delivery of water.

Without extending the argument further on this point, we say again that the conclusions of the District Court seem to us absolutely untenable when all the contracts, statutes and the surrounding facts and circumstances are taken into consideration.

The District Court admitted in evidence a printed circular over the objections of appellant (Plaintiff's Exhibit 17, Rec. pp. 147-156). The circular was not identified by anyone except the plaintiff, Mr. Sims, who stated that he received it from his father. There is no evidence that the Land and Water Company, or anyone connected with it, had ever seen the circular, or that anyone purchased any shares or water rights from the company because of anything contained in the circular. Mr. Sims, one of the plaintiffs and apparently the only person who had seen the circular, purchased his land from his father. (Rec. p. 164.) The circular on its face shows that it was issued some time after the lands were thrown open for entry, for it recites at the very beginning that "70,000 acres of this land were filed on during the month of June," hence not over 3,000 acres could possibly have been affected by anything contained in this circular; and in the absence of proof or evidence of any kind that anyone purchased shares or water rights from the company in reliance on the circular, we submit that it was entirely improper for the trial court to attach

any great importance to this circular or to anything therein contained.

What is stated in the circular in regard to the water supply is no stronger than the report of the State Engineer filed with the Board and is probably based on that report. We note, however, that the circular states (Rec. p. 148): "The Land Board advises and looks after the interest of the settlers." This was notice to proposed purchasers of the proper source of information concerning the project, the water supply, and the contracts.

The District Court excluded all evidence offered by the appellants tending to show that appellees were not injured and that they were receiving and would continue to receive all the water necessary for the proper irrigation of their land, and we pass now to a consideration of that question.

THE DUTY OF WATER WAS AN ISSUE UNDER THE PLEADINGS AND THE STATUTES.

The Court declined in this case to admit any evidence relative to the duty of water or the amount of water required for the proper irrigation of the lands of complainants and other contract holders. The decree of the Court therefore rests upon the alleged violation of a contractual right without proof of substantial injury or damages—past, present, or prospective. The Court in effect held that it was immaterial whether complainants needed or could apply to a beneficial use the additional amount of water which they claimed they were entitled to receive under their contracts.

That the duty of water was an issue under the pleadings, we think sufficiently appears from even a cursory examination of the bill. In paragraph XIII (Rec. p. 16) it is alleged that there is a large loss in transportation and that the average supply after deducting such losses "is inadequate to irrigate the acreage entered upon under water contracts sold," and in the next paragraph (Rec. p. 17) it is alleged that at least 2¾ acre feet per acre *is and will continue to be necessary even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops*, and will not enable the complainants and settlers upon said tract to comply with the said Carey Act regarding a permanent water supply to reclaim said land, or to enable them to farm or cultivate their said land profitably."

Similar allegations will be found throughout the bill. These allegations were denied by the answers filed by appellants, and to meet the issues thus presented, appellants at great expense brought from a distance a large number of witnesses—some fourteen or fifteen in all—to testify as to the amount of water required per acre under the project here in question. The qualification of the witnesses to furnish intelligent and reliable testimony upon this point cannot be questioned. We think we are entirely justified in saying that never before in a water case had so many witnesses, qualified by education, experience and scientific investigations, been in Court for the pur-

pose of furnishing intelligent and reliable information on the duty of water. The testimony of these witnesses would have been to the effect that plaintiffs were receiving and would continue to receive, except possibly in years of unusual drought, the amount of water necessary for the proper reclamation of their lands. The testimony of the witnesses which were called for this purpose was taken by way of depositions and is set forth in volume 2 of the record in this case, and we particularly urge the Court to examine the interesting and instructive testimony of these witnesses.

We desire particularly to call attention to the testimony of J. S. Welch (Rec. vol. 2, pp. 26-44). Mr. Welch is in charge of the Gooding Experiment Station in Idaho, where the soil and climate are substantially the same as on the Salmon river project. He gives the results obtained by varying amounts of water on different classes of crops, the purpose being to obtain the economic duty of water that should be insisted upon by the State in order to obtain the largest return from its water resources.

The results obtained by Mr. Welch are substantially the same as the results obtained by Doctor Widtsoe, of the Utah Agricultural College, and set forth in his recent book entitled "The Principles of Irrigation Practice." We shall quote briefly from Doctor Widtsoe's book as that may not be as convenient for the examination of the Court as the testimony on this subject in volume 2 of the record. On page 250, Doctor Widtsoe sets out a table showing

"yields of wheat with varying quantities of irrigation water," from which it appears that with 10 acre inches (5/6 of an acre foot) 43.53 bushels of grain were obtained; with 15 acre inches (1¼ acre feet) 45.70 bushels were produced; with 25 acre inches, 46.46 bushels were produced; thus showing that by increasing the amount of water from 10 acre inches to 25 acre inches, it increased the production by less than three bushels per acre, and that if the 25 acre inches instead of being applied to one acre where they produced 46.46 bushels had been applied to two acres—10 acre inches on one and 15 on the other—they would have produced 89.24 bushels.

On page 260, the results in the yield of corn with varying quantities of irrigation water are given. These results show that with 10 acre inches of water to an acre, 89.52 bushels were obtained; with 15 acre inches, 93.93 bushels; with 20 acre inches, 91.58 bushels; with 25 acre inches, 99.16 bushels; with 30 acre inches, 97.12 bushels; that as the amount of water was increased, the yield was decreased. The results again demonstrated that as the water was increased beyond 15 acre inches per acre, the yield either decreased or else the increase was wholly out of proportion to the value of the water applied, and again showing clearly that a wise public policy demanded that the water be extended over a larger area and a lesser amount used per acre than what has been the custom of the past in many parts of the West. Similar results were obtained in the investigations on the yield of alfalfa.

Probably the most learned and complete discussion of this subject will be found in the testimony of C. C. Thom, of the Washington State College of Agriculture, Pullman, Washington. Mr. Thom had spent considerable time on the Salmon River tract investigating the soil and its ability to hold or retain water. Mr. Thom had also carried on investigations in other parts of the country and made many scientific experiments of an interesting character, and we desire particularly to direct the attention of the Court to his testimony. (Rec., vol. 2, pp. 92 to 148.) Mr. Thom discusses the function of bacteria in plant growth, and shows (Rec. p. 102) that plant growth is in proportion to bacterial activity; that with 20% of moisture in the soil, bacterial activity is at its highest or greatest efficiency, which he calls 100%; that with 25% of moisture in the soil, bacterial activity is only 48% as great as when the per cent. of moisture was 20; that as the amount of moisture increases beyond 20%, bacterial activity decreases, and when the per cent of moisture reaches 35, bacterial activity absolutely ceases. Mr. Thom further shows the amount of water required to produce a pound of corn, or a pound of wheat, or a pound of potatoes, and these determinations are made in a way that their correctness cannot be disputed, and from the results obtained the amount of water required per acre for the various kinds of crops can be determined with a degree of accuracy not heretofore deemed possible.

Testimony was offered but excluded, except as taken by way of deposition and included in volume 2,

to show that there is grave danger of damaging the land on the Salmon tract by the use of more water than is necessary, that necessity for drainage already appears, and that the damaging results of over-irrigation can already be noted. (Rec. vol. 2, pp. 117-120; testimony of W. G. Sloan, Rec. vol. 2, pp. 63-76; and testimony of J. C. Wheelon, Rec. vol. 2, pp. 44-63.)

We need cite no authorities to the proposition that under the laws of Idaho and other States in the arid West, no one is permitted to divert or use more water than his necessities may require. The views of the courts and the legislatures of the several States on this point have been so frequently expressed and are so well known to this Court that we shall not encumber this already lengthy brief by excerpts from them. The legislature of the State of Idaho has forcibly expressed itself on this subject in Sec. 3240 of the Revised Codes, quoted in other parts of this brief.

Before any Court enters a decree that requires the cancellation or annulment of water contracts for the reclamation of land under a project that has been constructed by or under the supervision of the State authorities vested with power under the laws of the State to control the appropriation and distribution of water, the proof at least should show that injury of the gravest character will result to the settlers if the contracts be not cancelled and the project reduced to a smaller acreage than the State authorities had ordered should be reclaimed from such project. We submit, therefore, that the action of the District

Court, in declining to hear any evidence on the duty of water, or the need of the plaintiffs for an additional amount of water, before entering a decree of such drastic character, cannot be sustained. There are no equitable principles and no statutes governing the rights of water users and the distribution of water for beneficial purposes upon which the decree can be justified.

We desire next to consider the decree in its legal aspects or from the standpoint of the power of the Court to grant the relief which it did in this case.

INJUNCTION AGAINST ENFORCING COLLECTIONS ON WATER CONTRACTS SHOULD NOT HAVE BEEN GRANTED.

The decree herein restrained and enjoined the defendants, Twin Falls Salmon River Land & Water Company, Commonwealth Trust Company and A. C. Robinson, "from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the Court, that said water will be provided, or until the further order of this Court." (Trans. p. 394.)

It may be conceded that such relief is within the prayer of the bill (Trans. p. 38), and that two foreclosure suits on such contracts had already been brought and are still pending in the same Court,

while other foreclosure suits were in contemplation (Trans. p. 190). Nevertheless we submit that even upon the Court's construction of the settlers' contracts and the State contract and upon the facts as determined by the Court, plaintiffs were not entitled to this relief. The Court held that additional water could not be had (Trans. p. 305), and yet enjoined the defendants from collecting anything whatsoever on any of these water contracts until a water supply of one-hundredth of a cubic foot per second per acre continuous flow, or two and three-fourths acre feet per acre for the season be furnished the settlers.

The decision thus concedes that full compliance with all the settlers' contracts is a physical impossibility, and yet leaves the plaintiffs and the other settlers in whose behalf the action is brought in the possession of their proportionate or undivided interest in the system, and the water rights and water to the extent the company is able to furnish the same, and postpones indefinitely any collections by the company or its assigns for the undivided interests, shares, water and water rights actually furnished. Furthermore, the injunction prevents voluntary payments, as well as the enforcement of payment by foreclosure proceedings which in view of the lien granted by the contracts and the statutes would be the appropriate procedure and which the record shows was the procedure being followed.

The injunction quoted above contravenes at least three sound and well established principles of equity. They are:

1. Suits in equity will not be enjoined in a separate action because any defense that would justify such an injunction may be set up in the original action and the rights of the party fully protected.

2. Injunctions will not be granted against actions which are merely threatened or contemplated, because such actions may not be brought, and if brought it cannot be assumed that the rights of the parties seeking the injunction will be disregarded.

3. Equity will not enjoin the enforcement of a contract against a party who has all or part of what he contracted for, unless he gives up what he has received under the contract. These rules are amply sustained by the authorities and we will take them up in the order enumerated.

The first principle is thus stated in 22 Cyc. 810:

> "It is a general rule that a party will not be restrained by injunction from proceeding with a suit in equity, because complainant's equitable rights can be fully protected in that suit. An order to stay such suit should be obtained by an application in that Court itself. It follows that equity will not enjoin a suit to obtain an injunction, or an accounting, or a receiver. Nor will a foreclosure suit be enjoined for the relief of one who might obtain full relief in that suit itself."

In 3 Elliott on Contracts, Sec. 2499, the author says:

> "But an injunction will not be granted to stay proceedings in another equitable suit, either on application of the parties to the proceedings to

be restrained, their privies, or of strangers thereto, when the relief desired is procurable in the suit sought to be enjoined."

To the same effect are 16 A. & E. Encyc. of Law, 372, 4 Pomeroy Equity Jur., Sec. 1370-1372.

In High on Injunctions, Sec. 52, it is said:

"It is also a well established rule pertaining to that branch of the jurisdiction of equity under discussion, that an injunction will not be granted to stay proceedings in the same Court of Equity, either upon the application of parties to the proceedings sought to be enjoined, or of strangers to such proceedings, since a departure from the rule would lead to interminable litigation. A Court of Equity will not, therefore, enjoin the prosecution of another bill in equity or stay proceedings in another equitable action in the same Court, when no reason is shown why the party aggrieved cannot protect himself by interposing his defense in the former suit, since the defendant in the original suit can ordinarily avail himself of all his equities and defenses with full effect in that action."

In Savage v. Allen, 54 N. Y. 458, the Court states:

"The proposition that a separate action may, under our present system, be maintained to restrain by injunction the proceedings in another Court, between the same parties, where the relief sought in the latter suit may be obtained by a proper defense to the former one, has long since

been exploded, or, if not, should be without delay."

In another New York case, Wallack v. Society, 67 N. Y. 23, it is said:

"It would be an anomaly for a Court of Equity to issue an injunction restraining the defendant from applying to the same Court in the same matter."

In Waymire v. R. R. Co., 112 Cal. 646, 44 Pac. 1086, at page 1087, which was an action by stockholders to enjoin a foreclosure suit against the corporation, the Court made the following statement:

"It seems unaccountable that plaintiffs were advised that facts which would entitle them to a judgment nullifying the sale and transfer of the bonds, and perpetually enjoining the further prosecution of the action to foreclose the deed of trust, could not be made available as a defense to the foreclosure action. Even if the stockholders had demanded that the corporation institute an independent suit, such demand would have been properly refused, for the reason that, being the principal defendant in the suit to foreclose the deed of trust, *the corporation was not at liberty to institute an action in another Court, nor in the same Court, to enjoin further proceedings in the foreclosure action,* but was bound to plead the facts alleged in plaintiffs' complaint herein by answer, or, if necessary to aid the defense, by cross complaint, in the foreclosure action." (Our italics.)

The above rule has been applied in numerous cases, among which are the following:

Utah & N. R. Co. v. Crawford, 1 Ida. 770 (refusing injunction against suit to recover taxes).

Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042.

Mercantile Trust Co. v. B. & O. R. Co., 89 Fed. 606. (Before Circuit Judge Goff and District Judge Morris.)

Smith v. American Life Assur. Soc., 1 Clarke (N. Y.) 307.

Lane v. Clarke, 1 Clarke (N. Y.) 310.

Williams v. Brown, 126 N. C. 51; 37 S. E. 86. (All refusing to enjoin separate actions for the foreclosure of mortgages.)

Wilson v. Jarvis, 19 Wis. 597 (refusing injunction against suit to quiet title).

Dayton v. Relf, 34 Wis. 86 (refusing injunction against foreclosure of tax title).

Robertson v. Montgomery Baseball Assn., 141 Ala. 348, 37 So. 388 (refusing to enjoin suit for injunction).

Frantz v. Masterson, 133 S. W. 740 (Tex. Civ. Apps.) (refusing to enjoin foreclosure of vendor's lien notes).

Jackson v. Stearns (Ore.), 84 Pac. 798, 5 L. R. A., N. S. 390 (refusing to enjoin client from settling action without attorney's consent).

See also:

State v. McGee, 15 S. D. 247, 88 N. W. 115.
Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768.
Dyckman v. Kernochan, 2 Paige Chanc. (N. Y.) 26.
Schell v. Erie Ry. Co., 51 Barb. 368.
Hall v. Fisher, 1 Barb. 53.
Redd v. Blandford, 54 Ga. 123.

In the present case the only actions pending or contemplated were actions for the foreclosure of the lien conferred by the contracts and the Carey Act upon the interest of the settlers in their water rights and the land held by them, and it would seem that no other form of action could be employed. In such action the matters set up in the bill of complainants and shown by their proof could undoubtedly be relied upon and could be given full effect, and it follows that under the rule established by the authorities we have just cited the settlers were not entitled to an injunction restraining the company and its assigns from enforcing any of the contracts.

In the second place equity will not enjoin actions which are merely threatened or contemplated.

In High on Injunctions, Sec. 64, it is said:

> "It is to be observed, however, that mere apprehensions or fears on the part of the person seeking relief, that the defendant may institute actions against him in the future will not warrant a Court of Equity in enjoining the bringing of such actions."

The basis of this rule is that no Court can presume that the same Court or another Court of competent jurisdiction will act improperly and deny the rights of a litigant, and as long as the action is merely contemplated or threatened it may never be brought. This doctrine is supported by the following cases:

Williams v. Brown, *supra.*
Wallack v. Society, 67 N. Y. 23.
Wilson v. Jarvis, 19 Wis. 597.
Wolfe v. Burke, 56 N. Y. 115.
Frantz v. Masterson, *supra.*

As in the cases last cited, it cannot be presumed here that if actions for the enforcement of the balance due on these water contracts were brought in the State Courts or in the Federal Court for the District of Idaho, the defense that the settlers had not received the full amount of water they were entitled to under their contracts would not be given its full effect, or that such settlers would be deprived of any substantial rights by being called upon to defend such actions.

The injunction granted by the Court herein is a very stringent one. It absolutely prevents the Company and the parties to whom these contracts have been assigned from enforcing them in any way until the amount of water the Court holds they are required to furnish has been supplied, and yet the Court recognizes that there is no source from which this amount of water can be secured. The effect of the injunction is to indefinitely postpone any collections

whatsoever on these contracts, and at the same time to leave the settlers in possesion of everything that the Company can give them.

It would appear that the Court had in mind the possibility that some adjustment of the acreage for which contracts had been entered into could be made by the Company, but inasmuch as the action was brought in behalf of the named plaintiffs and all others similarly situated, which may be taken to include all the settlers on the project, it is difficult to see how any reduction could be made.

The situation thus presented seems closely analogous to cases where a vendor of land is unable to convey a perfect title to all the land he has agreed to convey. In such cases it is held that the vendee who seeks equity must do equity and if he is in possession of the property he cannot enjoin the collection of the balance of the purchase price. This question arose in the case of Rischar v. Shields, 26 Ida. 616, 145 Pac. 294, which was an action brought by the vendor of land to quiet title thereto on the ground that the vendees had forfeited their interest in the land by failure to make payments. The vendees filed answer and cross-complaint admitting the making of the contract and their failure to make payments, but alleging that plaintiff did not have title to a part of the land and could not furnish an abstract showing clear title in her. Defendants also sought by cross-complaint to recover back the money paid under the contract. The Court granted judgment for the plaintiff on the pleadings and on appeal it was said:

"Under a well-established rule of law, the allegations contained in said amended answer and cross-complaint were no defense to this action. The defendants ought to have tendered a compliance on their part with the provisions of said contract; they ought to have tendered the purchase price as stipulated and then if the plaintiff failed to produce an abstract of title showing a clear title and a warranty deed, as provided in the contract, they would have been in a position to recover back whatever damages they had sustained by reason of the plaintiff's failure or inability to comply on her part with the provisions. The vendees could not retain possession of said land and refuse and neglect to pay the price when due, or offer to pay it, since the failure of title would not give them the right to continue in possession and also the right to recover back the payments made on the land."

The case of Frantz v. Masterson, Tex. Civ. Apps., 133 S. W. 740, is clearly in point. It was an action to enjoin the foreclosure of vendor's lien notes on the ground of a partial failure of title. There was no offer to pay the amount justly due, and the Court held that it could not prevent the collection of all the notes as long as plaintiffs were in possession of all the land, and thus postpone indefinitely any efforts of defendants in error to collect the whole or any portion of the amount of the notes.

In Childs v. Lockett, 107 La., 270, 31 S. W. 751, it was held that a purchaser in possession could not

enjoin proceedings to enforce payment of the price on the ground that he had obtained no title. The same rule was adhered to in Burns v. Hamilton's Admr., 33 Ala. 210, 70 Am. Dec. 570.

In the present case it will be noted that the settlers are in default on installments already due under their contracts and make no offer to pay anything on these contracts. The evidence further shows that they have received a considerable amount of water during each of the years since water deliveries began, and under the decree entered herein the Company will be compelled to go on furnishing these settlers water without any compensation for such service or return on its investment; it is permitted to collect only the actual cost of delivering the water—simply annual maintenance—and this situation must continue indefinitely because the Court finds there is no further water to be had.

The Court has by its decree in effect confiscated the property of these appellants. Their interests in the water rights and irrigation system have vanished under the decision of the Court that the undivided interests already sold are in excess of the capacity of the system. Their only hope of return lies, therefore, in what they may be able to collect under their water contracts. The decree of the Court forbids them to collect until the acreage has been reduced and a large amount of water contracts cancelled and annulled. They are denied their constitutional right of due process of law and of access to the courts for the enforcement of their rights under the contracts. They have

not the power of Eminent Domain. They are required by the Court to accomplish the reduction by polite negotiations, and all that is necessary for the settlers to do in order to escape the payment of both principal and interest on their water contracts is to decline to resell to appellants sufficient water rights to bring the outstanding rights within the limit of the Court's order. Appellants in an attempt to reduce the acreage entitled to water will be purchasing at their peril, for if they fail to reduce the project sufficiently to meet the views of the Court, they have accomplished nothing by the money so expended. Verily, they are in a situation that would seem to demand relief.

These appellants (Commonwealth Trust Co. of Pittsburgh, Trustee, and A. C. Robinson) have done nothing to justify imposing such penalties upon them. They are guilty only of having furnished or of representing innocent bondholders who have furnished money that has been expended in the construction of the project and in giving to the settlers the water rights which they have and which they are now using. They advanced such money upon the faith of the Acts of Congress that the State was authorized to create a lien upon the public lands under the project in favor of those who advanced the money for construction, and upon the faith of the laws of the State expressly granting such lien, and upon the State Contract and contract of the purchasers specifying the amount of such lien per acre. It would seem that the most that plaintiffs can demand is that they be

given some recourse against the Land and Water Company, for the covenants which they claim it made and upon which the Court says they acted, are largely personal and can not go to the extent of impairing the lien created by the State and Federal laws above referred to.

For the reasons herein stated, we submit that the decree appealed from should be reversed and set aside.

Respectfully,

RICHARDS & HAGA and
McKEEN F. MORROW,
Solicitors for Appellants, Commonwealth Trust Company, Trustee, and A. C. Robinson.
Residence, Boise, Idaho.

APPENDIX.

The following sections are from the Revised Codes of Idaho:

Acceptance of the Carey Act.

Sec. 1613. The State of Idaho hereby accepts the conditions of Section 4 of an Act of Congress, entitled, "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, A. D. 1894, together with all the grants of land to the State under the provisions of the aforesaid act. The selection, management and disposal of said land shall be vested in the State Board of Land Commissioners, as constituted by Section 7 of Article 9 of the Constitution of the State of Idaho. Said State Board of Land Commissioners shall be hereinafter designated as the "Board."

Proposals to Construct Irrigation Works.

Sec. 1615. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the Board a request for the selection, on behalf of the State, by the Board, of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared

in accordance with the rules of the Board and with the regulations of the Department of the Interior; and shall be accompanied by the certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto. In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid-up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the Board to determine his or their financial ability to carry out the proposed undertaking.

Certified Check to Accompany Proposal.

Sec. 1616. A certified check for a sum not less than two hundred and fifty dollars, nor more than two thousand five hundred dollars, as may be determined by the rules of the Board, shall accompany each request and proposal, the same to be held as a guarantee of the execution of the contract with the

State, in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the Board, and to be forfeited to the State in case of failure of said parties to enter into a contract with the State in accordance with the provisions of this chapter.

Application for Appropriation Permit to Be Filed.

Sec. 1617. The person, company of persons, association or incorporated company making application to the Board for the selection of lands by the State, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the Board. This application for a permit shall be of a form prescribed by the State Engineer and shall be accompanied by two copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the State Engineer's office and the rules of the Department of the Interior.

Submission of Proposal to State Engineer.

Sec. 1618. Immediately upon the receipt of any request and proposal, as designated in Section 1615, it shall be the duty of the Register to examine the same and ascertain if it complies with the rules of the Board and the regulations of the Department of the Interior. If it does not, it is to be returned for correction; but, if it does so comply, it shall be submitted

to the State Engineer, who shall examine the same and make a written report to the Board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public waters of the State will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder. Whenever the State Engineer shall be unable, from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, whether or not the proposed cost of construction is reasonable, or whether or not the proposed diversion of the public water would be beneficial to the public interest, and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid Act of Congress, it shall be his duty to make, or cause to be made by some qualified assistant, such survey or

examination as will enable him to report intelligently thereon to the Board.

Approval of Application by Board.

Sec. 1619. On receipt of the report of the State Engineer the Register shall place the request and proposal with the Engineer's report thereon before the Board for its consideration. In case of approval the Board shall instruct the Register to file in the local land office a request for the withdrawal of the land described in said proposal. No request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the Board.

Adverse Report by Engineer.

Sec. 1620. In case the State Engineer shall report adversely upon the proposed irrigation works, or where requests and proposals are not approved by the Board, the said Board shall notify the parties making such proposal of such action and the reasons therefor. The parties so notified shall have sixty days in which to submit a satisfactory proposal; but the Board may, at its descretion, extend the time to six months.

Contract with Proposed Contractor.

Sec. 1621. Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the Board to enter into a contract with the parties

submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State.

Same; Limitations on Terms.

Sec. 1622. No contract shall be made by the Board which requires a greater time than five years for the construction of the works, and all contracts shall state that the work shall begin within six months from date of contract; that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the State for a period of six months after the second year, without the sanction of the Board, will forfeit to the State all rights under said contract.

Forfeiture of Contract for Contractor's Default.

Sec. 1623. Upon the failure of any parties, having contracts with the State for the construction of irrigation works, to begin the same within the time specified by the contract, or to complete the same within the time or in accordance with the specifications of the contract with the State, to the satisfaction of the State Engineer, it shall be the duty of the Register to give such parties written notice of such failure; and, if after a period of sixty days from the sending of such notice, they shall have failed to proceed with the work or to conform to the specifications of their contract with the State, the bond and contract of such parties and all works constructed thereunder shall be at once and thereby forfeited to the State; and it shall be the duty of the Board at once so to declare and to give notice once each week, for a period of four weeks, in some newspaper of general circulation in the county in which the work is situated, and in one newspaper at the State capital in like manner and for a like period, of the forfeiture of said contract, and that upon a fixed day proposals will be received at the office of the Board in the Capitol at Boise City for the purchase of the incompleted works and for the completion of said contract, the time for receiving said bids to be at least sixty days subsequent to the issuing of the last notice of forfeiture. The money received by the board from the sale of partially completed works under the provisions of this section shall first be applied to the expenses incurred by the State in their forfeiture and dis-

posal, and to satisfying the bond; and the surplus, if any exists, shall be paid to the original contractors with the State.

State Not to Be Responsible for Work.

Sec. 1624. Nothing in this chapter shall be construed as authorizing the Board to obligate the State to pay for any work constructed under any contract, or to hold the State in any way responsible to settlers for the failure of contractors to complete the work according to the terms of their contracts with the State.

Publication of Notice of Opening.

Sec. 1625. Immediately upon the withdrawal of any land for the State by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the Board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the State capital, for a period of four weeks, to give notice that said land, or any part thereof, as the Board in its discretion may deem is for the best interest of the State, is open for settlement, the price for which said land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works.

Application to Enter Land.

Sec. 1626. Any citizen of the United States, or any person having declared his intention to become a citizen of the United States (excepting married women) over the age of twenty-one years, may make

application, under oath, to the Board, to enter any of said land in an amount not to exceed one hundred and sixty acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the Act of Congress and the laws of this State relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company or association who has been authorized by the Board to furnish water for the reclamation of said lands; and, if said applicant has at any previous time entered lands under the provisions of this chapter, he shall so state in his application, together with description, date of entry and location of said land. The Board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose If the application is not allowed, the twenty-five cents per acre accompanying it shall be refunded to the

applicant. The Board shall dispose of all lands accepted by the State under the provisions of this chapter at the uniform price of fifty cents per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler.

Disposition of Proceeds of Sale.

Sec. 1627. As provided in the Act of Congress, all moneys received by the Board from the sale of lands selected under the provisions of this chapter shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the Board and of the State Engineer's office incurred in carrying out the provisions of this chapter.

Such expenses shall be paid by the State Auditor in the manner provided by law, upon vouchers duly approved by the State Board of Examiners, for the work performed under the direction of the State Board of Land Commissioners, and by the State Engineer for all work performed by the State Engineer's office; and any balance remaining over and above the expense necessary to carry out the provisions of this chapter, shall constitute a trust fund in the hands of the State Treasurer to be used only for the reclamation of other arid lands.

Proof of Reclamation by Settlers.

Sec. 1628. Within one year after any person, company of persons, association or incorporated company, authorized to construct irrigation works under the provisions of this chapter, shall have notified the

settlers under such works that they are prepared to furnish water under the terms of their contract with the State the said settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the register of the State Board of Land Commissioners, a judge or clerk of any Court of record within the State, or commissioners to be designated by the Board, within the State, and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient in volumn for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one-eighth part of said tract; and such further proof, if any, as may be required by the regulations of the Department of the Interior and the Board. The officer taking this proof shall be entitled to receive a fee of two dollars, which fee shall be paid by the settler and shall be in addition to the price paid to the State for the land; *Provided*, That when the Register of the Board takes final proof, all fees received by him shall be turned into the State Treasury. The commissioners appointed by the Board are hereby authorized to administer oaths. All proofs so received shall be submitted by the Register to the Board

and shall be accompanied by the final payment for said land, and upon approval of the same by the Board the settler shall be entitled to his patent. If the land shall not be embraced in any patent theretofore issued to the State by the United States, the proofs shall be forwarded to the Secretary of the Interior, with the request that a patent to said lands be issued to the State.

When the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the State of Idaho shall, through the State Board of Land Commissioners, make proof of such fact, and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior.

Water Contracts a Lien on Land Foreclosures.

Sec. 1629. Upon the issuance of a patent to any lands by the United States to the State, notice shall be forwarded to the settler upon such land. It shall be the duty of the Board, under the signature of the President, attested by its Register, to issue a patent to said lands from the State to the settler.

The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water

right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate.

Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company of persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right. All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for six consecutive weeks, and shall be sold to the highest bidder at the front door of the Court House of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all such cases give all notices of sale, and shall sell all such lands and water rights, and shall make and execute a certificate of sale to the purchaser thereof. And at such sale no person, company of persons, association or incorporated company, owning and holding any lien, shall bid in or

purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right.